SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

JURISDICTIONAL STATEMENT

WILLIAM W. OWENS
Counsel for Appellant
100 Broadway
New York 5, New York

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(No statutes are cited other than the taxing statutes involved in this proceeding, which are set forth in Appendix B hereof.)

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JURISDICTIONAL STATEMENT

The Opinions Below

There are not, in any real sense, any opinions delivered by the courts below except an Appellate Division interim opinion sending the case back to appellee for the redetermination of penalties. The propriety of penalties is not a question which appellant seeks to have reviewed here.

The opinions, if they can properly be called such, are nevertheless set forth in Appendix A, together with citations in instances where the opinions have been published.

Grounds of This Court's Jurisdiction

This proceeding was commenced in the Supreme Court of the State of New York, County of New York, as one under Article 78 of the New York Civil Practice Act to review the determination of an administrative officer,—in this case, the assessment and collection by the Comptroller of the City of New York of $31,411.28 alleged deficiency in General Business Tax (i.e., gross receipts tax) on certain of appellant's gross receipts in the calendar years 1946, 1947 and 1948 (R. 5-16). The General Business Tax is for the privilege of doing business in the City of New York in the twelve months period commencing on July 1 of the calendar year of the receipts taxed and ending on the following June 30 (*infra,* pp. 35, 52, 70-71, 72, 75).

Pursuant to Section 1296 of the New York Civil Practice Act the court of original jurisdiction, as a purely administrative act, transferred the proceeding to the Appellate Division of the Supreme Court for the First Judicial Department for determination on the petition and answer and on the stenographic record made before a referee in appellee's Bureau of Excise Taxes (R. 3-4). That court, in an intermediate opinion, confirmed the tax without opinion but vacated the penalties and sent that question back for redetermination by appellee (R. 672-676).

After redetermination, the case came up again in the same manner as before (R. 531-546) and the Appellate Division then entered its final order confirming the tax (R. 679-681).

Appellant then carried the case to the New York Court of Appeals (R. 669-670, 677-678) which affirmed without opinion (R. 684-687; *infra,* p. 30). That is the highest court of New York.

The court of original jurisdiction (the "lowest court") then entered two pro forma orders making the order of the Court of Appeals its order (R. 688-691). Both lowest court orders are substantially the same. The duplication arose from the fact that appellee had an order signed without notice and neither filed it nor served it. Fearing that its time to appeal might nevertheless be running, appellant got a similar order on notice to appellee and filed and served it.

Technically, the final orders are the two orders of the lowest court; but those are not orders of the highest court of the state [see requirements of U. S. Code, Title 28, section 1257(2)]. Therefore appellant has taken the precaution of appealing from all three,—the order of the Court of Appeals and the two orders of the Supreme Court, New York County, which were entered thereon (R. 710-711, 715-716). The details as to dates are as follows:

Court of Appeals Final Order of Remittitur—dated March 2, 1961 (*infra*, pp. 78-81)

Entered in Office of Clerk of County of New York on March 23, 1961

Re-entered in Office of Clerk of County of New York on April 3, 1961 after first recall and amendment of remittitur

Re-entered in Office of Clerk of County of New York on June 1, 1961 after second recall and amendment of remittitur

Supreme Court, New York County, Order on Remittitur—dated March 23, 1961 (*infra*, pp. 84-85)

Entered in Office of Clerk of County of New York on April 17, 1961

Supreme Court, New York County, Order on Remittitur—dated April 14, 1961 (*infra*, pp. 82-83)

Entered in Office of Clerk of County of New York on April 14, 1961

As will hereinafter be shown, the main question on the appeal from the foregoing orders is whether the taxing ordinance, as it has been applied here, violates the import-export clause of the federal constitution.

A second question is whether the Court of Appeals, and also the Appellate Division before it, deprived appellant of due process of law by receiving from appellee, and reading before they rendered their decisions, the written opinions and recommendations of appellee's referees in his Bureau of Excise Taxes, without requiring those opinions to be included in the record and without disclosing their contents to appellant or its counsel.

Those actions of the courts below could be evidenced only by motions of appellant reciting what had occurred and seeking relief (R. 693-701, 704-709). Neither appellee nor the Court of Appeals disputed appellant's recital of what had occurred; but the Court of Appeals refused relief in two orders dated respectively March 2, 1961 and March 23, 1961 (R. 692, 702-703; *infra*, pp. 86-89), both entered in the office of the Clerk of the County of New York on June 2, 1961. The appeal has been taken from those orders too (R. 711, 716-717).

The notice of appeal (R. 710-714) was filed in the Office of the Clerk of the County of New York on April 27, 1961. Because the Court of Appeals thereafter recalled and amended the remittitur a second time so as to state that the constitutional question had been presented and necessarily decided (R. 686), an amended notice of appeal (R. 715-720) was filed in the same office on June 2, 1961.

Jurisdiction of this appeal is conferred by section 1257(2) of Title 28, United States Code, inasmuch as (a) the appeal is from a final order of the highest court of New York, (b) the appeal draws in question the validity of Local Laws No. 14 of 1946 and No. 44 of 1948 of the City of New York on the ground that, as applied to this case by the court below, they are repugnant to clause 2 of section 10 of Article I (the import-export clause) of the Constitution of the United States (R. 686) and (c) the decision of the Court of Appeals is in favor of the validity of the local laws (R. 686). The foregoing local laws were enacted under enabling acts of the State of New York known as Chapter 338 of the Laws of 1946 and Chapter 489 of the Laws of 1948. The local laws and the enabling acts are set forth verbatim in Appendix B hereof.

The cases sustaining the jurisdiction of this Court are *King Manufacturing Co.* v. *City Council of Augusta,* 277 U. S. 100; *Jamison* v. *Texas,* 318 U. S. 413, 414; *Independent Warehouses* v. *Scheele,* 331 U. S. 70, 79; *Poulos* v. *New Hampshire,* 345 U. S. 395, 402. They are cases where this Court held that an ordinance of a municipality or other political subdivision of a state was within the purview of the words "statute of any state" as they are used in 28 U. S. C. § 1257(2).

Questions Presented

There are two questions:

1. The primary question is whether it was a violation of the import-export clause of the federal constitution for the City of New York to assess and collect a gross receipts tax on the rentals received by appellant for the use abroad of appellant's motion picture film which was shipped abroad from the City of New York.

2. The second question is whether the Court of Appeals deprived appellant of due process of law within the meaning of the Fourteenth Amendment to the Constitution by receiving from appellee's counsel over the protest of appellant's counsel and reading the reports of appellee's referees in his Bureau of Excise Taxes without disclosing their contents to appellant or its counsel and without requiring them to be inserted in the record.

STATEMENT OF THE CASE

The Substantial Federal Questions

The Court will be in a better position to evaluate the importance of this appeal if appellant, before setting forth the basic facts, explains why it deems the constitutional questions to be substantial.

By written agreement, appellant rented its motion picture film to a subsidiary for exploitation only outside the United States and Canada. The film was shipped abroad by common carrier from the City of New York. It was never used by the subsidiary in the United States. The rent which has been subjected to the gross receipts tax is a contract-prescribed percentage of what the subsidiary realized abroad from the exploitation of the film abroad.

The export of personal property for rental abroad is a growing activity. It is now a continuous practice of motion picture producers; and it undoubtedly exists and will grow in other industries which are seeking foreign rental markets for patented machinery and equipment.

In *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69, this Court said that a tax on the gross receipts from the export of goods was as much a violation of the import-export clause as a tax on the goods themselves. That was a case where title and possession

passed, and the right to compensation became fixed, as the goods were loaded into a vessel in Los Angeles harbor to commence their export journey. In the instant case, the compensation could not be determined until the completion of the export journey inasmuch as the rent which appellant was to receive depended upon the amount of the bailee's receipts from foreign exploitation.

The substantial federal question is whether a gross receipts tax on rentals arising out of an export transaction is as vicious as a gross receipts tax on the proceeds of an export sale. It is submitted that there is no valid constitutional distinction between the two. The tax is the same tax, except as to the years involved, which this Court struck down when applied to the gross receipts of a stevedoring company for loading ships in foreign commerce at New York City docks. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422.

The second federal question seems to be a question of first impression. There was a written opinion by appellee's referee in his Bureau of Excise Taxes,—the referee before whom was made the record which constitutes the basis of the judicial proceedings below. That opinion has never been disclosed to appellant or its counsel. Yet, the court below, before deciding this case and over objection of appellant's counsel, asked for and received copies of that opinion from appellee's counsel and did not permit appellant's counsel to see them. The court below belatedly attempted to explain to this Court why it read the referee's opinion; but, as will hereinafter be shown, its explanation is a subterfuge and ought not to be acceptable even if true.

The second substantial federal question is therefore whether a state court may receive from the attorney for a litigant relevant documents which are not privileged and conceal their contents from the adversary's counsel. Appel-

lant believes that such a practice runs contrary to conceptions of judicial impartiality and ought to be an infringement on due process as guaranteed by the Fourteenth Amendment. An analogous, though not identical, action of a special master appointed by a federal court was noted with seeming disfavor by this Court in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 578-579.

Raising the Constitutional Issue

The New York Court of Appeals, on appellant's application, has amended its remittitur to recite that the conflict of the local laws with the import-export clause of the Federal Constitution was presented and necessarily passed upon (R. 686). The application was necessary because neither court below had written an opinion. The same constitutional question was raised in appellant's petition which commenced the judicial proceeding (R. 12-13). It was the only ground urged by appellant in its briefs in either lower court to establish the illegality of the tax. It was also the only ground urged before the referee in the administrative proceeding which was the basis of the judicial proceeding. Appellant believes that the referee's opinion, if disclosed, would reveal that fact and would also reveal that the referee considered the point well taken.

The other constitutional question was raised by motion as soon as the lower courts, over the oral protest of counsel, received the referees' reports without disclosing their contents to appellant's counsel and without inserting them in the record (R. 693-701, 704-709).

The Facts as to the Tax

Appellant is a motion picture producer with its executive offices in the City of New York and its studio in Los Angeles (R. 189-190). It had contracts with subsidiaries

which rented appellant's film to theatres in foreign countries (Exhs. 3, 4, 5, 12, 13, 14, 15; R. 85, 47, 48, 99, 103, 106, 107). Under the contracts appellant was entitled to receive, for the use of its film, a prescribed portion of the foreign film rentals (R. 290-292, 317-319, 349-350, 363, 375-376, 395-396). It is those receipts which appellee's predecessor sought to tax.

After the taking of the testimony before a referee in appellee's Bureau of Excise Taxes which comprises the bulk of the record before this Court, appellee abandoned his claim to tax on the rentals for certain of the film shipped from New York City to Canada, Denmark and France and on film shipped abroad from points in the United States other than New York City, but continued to assert the tax on the following two categories of appellant's receipts:

(a) From the exploitation by Twentieth Century-Fox Inter-America, Inc. (hereinafter called "Inter-America") and its subsidiaries, in the Western Hemisphere other than the United States and Canada, of appellant's film shipped by appellant from New York City to such foreign countries (R. 55-58, 73-74, 267-276; Exh. 5).

(b) From the exploitation by Twentieth Century-Fox International Corporation (hereinafter called "International") and its subsidiaries, in the Eastern Hemisphere (and, for the first twenty-six days of 1946, in the Western Hemisphere other than the United States and Canada), of appellant's film shipped by appellant from New York City to such foreign countries (R. 56-58, 73-74, 267-276; Exhs. 3, 4).

There were two types of films so shipped abroad from a point within the City of New York—(a) black and white

film and (b) color film. The three years' receipts from black and white were $18,445,925.32 and the tax was $24,712.49. The corresponding figures for color film were $5,258,246.69 and $6,698.88 (Exhs. 2, 21; R. 85, 230).

The above mentioned receipts were paid by International under an agreement with appellant dated September 22, 1944 (Exh. 3)* as amended on January 26, 1946 (Exh. 4); and by Inter-America under an agreement with appellant dated January 26, 1946 (Exh. 5). Under Exhibit 3 International was to distribute appellant's product throughout the world except the United States and Canada (R. 284). Under Exhibits 4 and 5 the Western Hemisphere outside the United States and Canada was excluded from International's area of operations after January 26, 1946 and assigned to Inter-America (R. 306-307, 311). Since Exhibits 3 and 5 are not substantially different and the operations thereunder were identical, the use of the name "International" in the ensuing discussion means "International and Inter-America".

Appellant agreed to deliver to International at International's principal office in New York City or at such "other port or embarkation point" as might be designated by appellant from time to time (a) complete positive prints or duplicate negatives or lavenders, (b) copies of the dialogue and action continuities, (c) copies of cue sheets for all music used in the pictures, (d) the names of the literary properties upon which the productions were based and (e) the necessary number of still photographs for each production (R. 287-288, 293, 313-314, 320). The meaning of the terms "positive prints", "duplicate negatives", "lavenders" is not

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*When the page at which an exhibit was admitted has already been given in this statement, it will not be repeated if the exhibit is again mentioned. The information is readily ascertainable at index pages iii to vi at the front of the record before the Court.

vital to this proceeding although it is explained fully in the record (R. 52, 66-67, 70, 72). It is sufficient for present purposes that the terms all mean motion picture film.

International agreed to distribute the film in the territory assigned to it (R. 288, 314-315) and to make no alterations except such as were required by a board of censors or in order to conform to the peculiar racial or political prejudices likely to be encountered in the foreign country (R. 289, 316).

The gross receipts at issue are receipts under section Ninth of the two agreements (Exhs. 3, 5) and are appellant's share of the rentals derived by International and its subsidiaries from the exploitation of the film outside the United States (R. 118-119, 192, 258). Appellant will discuss black and white pictures and pictures in color separately because there was some difference in the physical handling of the two types of film.

In all cases the film for black and white pictures was made by De Luxe Laboratories, Inc. (hereinafter called "De Luxe") in the City of New York (R. 54-55), billed to appellant (R. 79-80, 85-86, 113, 143; Exh. 8; R. 83), paid for by appellant (R. 56, 62, 89, 91, 111, 143; Exh. 10; R. 92), packed by De Luxe and either delivered by De Luxe to customs brokers in New York City for immediate export outside the United States or delivered by De Luxe to the steamship dock in New York City for immediate export outside the United States or picked up by Air Express Agency at De Luxe's New York City laboratory for immediate export by air outside the United States (R. 55-57, 58, 61-62, 73-74, 81, 117-118). All shipping expenses were charged by De Luxe to appellant and paid by appellant (R. 62, 91, 113).

In no instance were the black and white films delivered to International or to Inter-America in the United States

or stored by them in the United States (R. 56, 73-74, 205, 219); nor were they delivered to anyone in the United States other than the foreign forwarders (R. 58, 73-74, 81).

So much for the handling of pictures in black and white, which yielded $18,449,925.32, or about 77.82%, of the $23,708,172.01 which appellee has taxed. The method of handling color film was as follows:

The color films were made by Technicolor, Inc. in California at appellant's expense, sent by Technicolor to De Luxe in New York (R. 57, 74, 208), which packed and shipped them abroad at appellant's expense in the same manner as black and white films (R. 57-58, 74). However, not every color film was exported as soon as it arrived in New York City (R. 188). Those which were not immediately exported were in three categories:

(a) Some were sent by De Luxe to an independent organization named "Titra" at Fort Lee, New Jersey, where they were "superimposed" at appellant's expense (R. 189, 206-208, 223-224). That means that Titra placed on the film, in the written language of the country for which it was destined, a translation of the English dialogue (R. 163-164). When this was done, Titra shipped the film back to De Luxe in New York City which exported it in the same manner as black and white and charged the shipping expense to appellant (R. 57-58, 74, 208).

(b) Sometimes import, censorship or currency restrictions in a foreign country prevented the immediate export of a color film (R. 157-158, 213-215, 223-224). In that case De Luxe sent the color film to an independent organization named "Bonded Film Storage" at Fort Lee, New Jersey, where it was held in storage until the foreign import permit could be obtained (*idem.*).

International paid the storage charges (R. 224). When the permit was obtained, Bonded Film Storage shipped the film back to De Luxe in New York City which immediately exported it at appellant's expense in the same manner as black and white (R. 185-186).

(c) Because of the high expense of ordering only a few color films at a time from Technicolor and of the delay in getting them, there arose a practice of ordering extra color films from time to time for the foreign market (R. 61, 153-154, 211, 219). When they were received by De Luxe in New York City it sent them to Bonded Film Storage at Fort Lee, New Jersey, until they were needed abroad (R. 153). International paid the storage charges (R. 224). When they were needed, Bonded Film Storage shipped them back to De Luxe in New York City which immediately exported them at appellant's expense in the same manner as black and white (R. 185-186).

The reason black and white film did not go to New Jersey is twofold: (i) All superimposing on black and white was done by De Luxe in New York City (R. 205, 219, 234). (ii) It was not necessary to hold black and white films in reserve inasmuch as a black and white film cost the same whether made alone or as part of a larger order and it could be made in a few hours (R. 205, 219).

As hereinbefore noted, the contracts required appellant to deliver certain incidentals to International (R. 287-288, 313-314). The tax is not assessed against what appellant got for the incidentals; but the Court may want to know how they were handled.

The dialogue and action continuities required by the contracts were prepared by appellant at its studio in Hollywood, California, and sent from there to the overseas office

of International which required them. (R. 190). Cue sheets were prepared by appellant in Hollywood, sent to appellant's legal department in New York City and shipped by the legal department to the foreign country where required (R. 190-191). The names of the literary properties upon which each production was based were sent abroad by appellant in a letter of advice whenever they were requested (R. 191).

The still photographs which are called for by the contracts were, until July 1, 1947, purchased by International from appellant in the United States and sent abroad (R. 191). After that date International purchased them from an independent laboratory and petitioner was not involved in the transaction (R. 191). In any event, the charges for still photographs, whether before or after July 1, 1947, are not part of the receipts involved in this proceeding (R. 192).

The Law as to the Tax

The decisive factor in this case is that none of the receipts which appellee has taxed were receipts from the use of the film in the United States (R. 192). The contracts did not authorize their use in the United States (R. 284-285, 311-312); they were not so used (R. 58, 73, 137-138, 185); and the receipts were all measured by the earnings of the film abroad (R. 192). These receipts did not arise, and could not have arisen, except as the result of *export* of the film. These facts were not disputed by appellee before the lower courts although, of course, he did not concede that they were decisive.

Neither appellee nor the Appellate Division nor the Court of Appeals has disclosed why he or it considers the receipts from International and Inter-America to be subject to the gross receipts tax. The referee's report, which would presumably throw some light on the matter (R. 21),

has been withheld with the approval of both lower courts although the Appellate Division hints strongly that the report is favorable to appellant (R. 682). Appellee's abandonment of his effort to tax receipts from petitioner's subsidiaries from the exploitation of film shipped by petitioner from New York City to Canada, Denmark and France under written contracts (Exhs. 12, 13, 14) identical to those with International (Exhs. 3, 5) makes his logic the more obscure, inasmuch as those shipments were handled in precisely the same manner as the shipments to International (R. 88, 96-106, 108).

Clause 2 of section 10 of Article I of the United States Constitution provides that:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

The import-export clause is not to be confused with the commerce clause of the Constitution. Under the commerce clause, interstate commerce may be taxed so as to make it bear a fair share of the cost of local government. Not so, foreign commerce. *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69, 75-76 (1946): *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U. S. 534, 557-558 (1959).

It is submitted that the *Richfield* case is determinative of the issue presented here. There, Richfield, a California corporation, sold oil to the New Zealand government f. o. b. Los Angeles and delivered it in Los Angeles harbor on board a tanker supplied by the purchaser. The California State Board of Equalization contended that the passage of title from Richfield to New Zealand by delivery of the property in the City of Los Angeles was sufficient to enable it to collect a tax from Richfield measured by Richfield's gross receipts from the transaction. The tax, while denominated a

sales tax, was, as the Court recognized, a gross receipts tax payable by the seller, not by the buyer (pp. 83-84).

In holding the tax unconstitutional even though title and possession passed at Los Angeles, this Court said (pp. 82-83, 85):

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.
>
> "It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of 'export' is the same under that Clause and the Import-Export Clause (see *Brown* v. *Maryland*, *supra*, p. 445; *Turpin* v. *Burgess*, *supra*, p. 506), the same result follows here.
>
> * * * *

> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. *United States* v. *Hvoslef, supra.* What was said there (p. 13) is equally applicable here: 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' And see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218."

The *Richfield* case, it will be noted, was an attempt to tax the gross receipts from the sale of goods which were exported, receipts which would have been realized by the seller even if the buyer had failed to export them. The Court said that the fact of export plus the reasonable certainty that the goods would be exported were sufficient to vitiate the tax. The import-export clause, the Court says, is more than a mere exemption from taxes laid specifically upon exported goods themselves. It is an exemption from tax on the receipts arising from the export. The Court reiterated that principle in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, where it held that the same tax which is before the Court in the instant case was unconstitutional when applied to the gross receipts of a stevedoring company for loading export goods on ships at docks in the City of New York.

The instant case, it is submitted, is even stronger than *Richfield* and *Carter & Weekes* for inhibiting the tax. The sole measure of these receipts, of the consideration received by appellant, was the amount of money which the films earned abroad. The contract conferred no authority on International to use the films in the United States (R. 284-

285, 311-312); they were not used by International in the United States (R. 58, 73, 137-138, 85); and there was no provision for any payment if they were wrongfully used in the United States (Exhs. 3, 4, 5). The goods *had to be* exported before the receipts which have been taxed could have arisen. That should be determinative of this case.

The main tenor of appellee's argument in his brief in the Court of Appeals seemed to be that possession of the films passed in the City of New York before they commenced their export journey. In the Appellate Division he had also argued that title to the films passed before the export journey commenced; but he did not press that contention in the Court of Appeals. Both arguments are erroneous; but it wouldn't matter anyhow. As this Court said in *Richfield,* the test is not where or when title or possession passes but, rather, whether "the certainty of the foreign destination is plain" (329 U. S. 83). Here, unlike *Richfield,* there would have been no receipts if there had been no export. At some risk of diverting attention from the decisive factor in this case, appellant will nevertheless explore the question of where and when title and possession passed.

As hereinabove shown, possession of black and white film was never in International before the goods started their export journey and, while on occasion color film was stored at International's expense while awaiting export, it always came back into appellant's possession to be exported. Appellee argued below that the fact that International gave the instructions as to how many black and white films were to be made and as to where they were to be shipped was evidence that, while in the custody of De Luxe, they were in the constructive possession of International. However, a customer always says what he wants and how he wants the goods to be delivered.

Moreover, the films never existed until De Luxe made them, so that it would seem apparent that, if possession ever passed from appellant to International, it could only have been at the moment of export, as in *Richfield*.

The distribution contract (Exhs. 3, 5) is poorly drawn, but an analysis of the contract will clearly disclose that title never passed and that there was nothing more than a rental to International of petitioner's film.

The New York Court of Appeals has said that a contract containing inconsistent provisions is to be interpreted, if possible, so as to give meaning to the whole, and that specific provisions take precedence over general provisions. *Muzak Corp.* v. *Taft Hotel Corp.*, 1 NY 2d 42, 46, 133 N. E. 2d 688, 690; *O'Keeffe* v. *City of New York*, 173 N. Y. 474, 480, 66 N. E. 194, 196; *Daly* v. *O'Rourke*, 172 N. Y. 447, 452, 65 N. E. 273, 274-275. With that principle in mind, appellant turns to the contract.

The contract is entitled "Motion Picture Purchase and Sale Agreement" (R. 282, 309). The agreement itself recites (R. 295, 322):

> "It is understood and agreed that International is not an agent or representative of Fox and that this agreement is intended as a purchase and sale agreement."

Other than the title and the above quoted provision, both of which are in general terms only and make no mention of films, there is nothing that could be construed to indicate that the films were being sold.

While appellant purported to "sell" the *right to exhibit* the film outside the United States and Canada (R. 284, 290, 311, 316), it is apparent that the exhibition rights were only licensed, for later on the contract says that such rights revert to appellant upon the termination of the agreement "as fully as though the same had never been acquired by International" (R. 298, 325). That provision was not

a precaution devoid of substance, for the agreement was terminable by either party on sixty days' notice to the other (R. 299, 326).

Furthermore, the right to exhibit may not be treated separately from the film itself for New York City excise tax purposes if, as here, the right to exhibit is worthless without possession of the film. *United Artists* v. *Taylor,* 273 N. Y. 334, 341, 7 N. E. 2d 254, 256. The *United Artists* case involved a contract for domestic film rental which was otherwise indistinguishable from the contract here. The court said (p. 341):

> "The transaction which is the subject of the tax under review consists of the transfer by the distributor to the exhibitor of the possession of corporeal property in the form of positive and negative prints of photoplays *with the license to use or exhibit them for a specified time.* The license to exhibit without the transfer of possession would be valueless. Together they are one transaction and constitute a sale within the definition of Local Law No. 24. In so far as this sale originates and is consummated in New York City, it is subject to the tax. In so far as the transfer of possession of the prints and the license to exhibit them is effected in territory outside the city, then no tax is applicable." (italics supplied)

In that case, the court was dealing with a local law imposing a sales tax. The law defined the term "sale" to include a rental.

When the contract in the instant case speaks of the film itself, it says that International may not sell, pledge, encumber or otherwise dispose of any of it (R. 286, 313). When the commercial exploitation of the film has been completed International must either return it to appellant or give appellant proof that it has been lost or destroyed (R. 289, 316). Those are the only provisions which men-

tion the film. They are not limitations that one imposes upon a buyer, upon a person who acquires title; they are limitations that one imposes upon a tenant, a bailee.

That the parties so understood is apparent from section NINTH, the section which prescribes the compensation which petitioner is to receive. After prescribing as compensation a percentage of International's receipts from the exploitation of the film abroad (R. 290-291, 317-318), the contract says (R. 291, 318):

> "International further agrees to pay to Fox *as additional rental* for the rights herein sold * * * the cost of all positive prints, dupe negatives, duplicating positive prints, lavenders and trailers, cost of dubbing, super-imposing, spotting, re-recording of sound tracks, titles, replacement or repair of prints or parts thereof and cost of shipping containers" (emphasis supplied).

Clearly, the contract contemplated only a *rental* by appellant to International. This is confirmed by the book entries—book entries which appellee himself insisted on placing in the record (R. 119-120, 121-123, 128-129, 130, 192, 195-196, 198-201, 258). The parties to the contract consistently entered these percentage payments in their books as "film rentals" (Exhs. N, O; R. 195). The parties' course of conduct over a long period resolves any doubt as to what they intended. *Muzak Corp.* v. *Taft Hotel Corp.*, 1 NY 2d 42, 46, 133 N. E. 2d 688, 690, *supra*.

Paragraph (e) of section 35 of the Restatement provides (1 Restatement of the Law of Contracts 319):

> "(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

The Facts As to the Denial of Due Process

Neither of the lower courts has written an opinion in this proceeding. Appellee himself has not said on the record why he considers the tax to be due. The only opinions that have been written are those of appellee's referees in his Bureau of Excise Taxes,—one as to the liability for tax and the other as to the liability for penalties (R. 61, 542-543, 545, 553-555).

Appellee has been at pains to conceal the referees' reports from appellant and its counsel (R. 553-555). The record does, however, disclose that the written report of Referee Scalice, who presided over the administrative hearings with respect to liability for the tax (R. 37, 77, 132, 203, 233, 264), was approved by his immediate superior without change (R. 637-638). The Appellate Division, which read the Scalice report before rendering its final decision but did not let appellant or its counsel see it (R. 697), has used language indicating that the reports of both referees may have been favorable to appellant (R. 682).

In the Court of Appeals appellant contended that the reading of the referees' reports by the Appellate Division without disclosing their contents to appellant's counsel was a denial of due process of law (R. 700). It asked that court to order their insertion in the record and to direct a judicial review *de novo* (R. 701). That motion came on for argument at the same time as the appeal from the appellate division orders (R. 693-694, 704-705, 708-709).

It is undisputed that the following transpired at the oral argument:

The Chief Judge of the Court of Appeals asked counsel for appellant whether he had any objection to that court's receiving and reading the written reports of the referees. Appellant's counsel immediately replied that he objected to the court's receiving any papers relating to the proceeding

unless their contents were disclosed to appellant's counsel and were included in the record (R. 708).

Shortly thereafter the Chief Judge told appellee's counsel that the court would receive the reports anyhow; and appellee's counsel thereupon gave him seven copies of the referees' reports. The court did not request appellee's counsel to give counsel for appellant copies of what he had just given the court and appellant's counsel has never seen them (R. 709).

Thus the Court of Appeals read these referees' reports before rendering its decision. Simultaneously with the rendering of its decision it denied, without comment, appellant's motion to include the reports in the record (R. 684, 692; *infra*, p. 30). Thereafter, appellant made a motion to insert in the record what had transpired at the argument (R. 704-709). While not disputing appellant's version of what had transpired at the argument, the Court of Appeals avoided a direct response by saying that it had examined the referees' reports to determine whether they contained any evidence (R. 703; *infra*, p. 30).

That is the same language which the Appellate Division had used (R. 682); and it is a subterfuge. Every jurist well knows that a referee's report does not, and cannot, contain evidence. Appellant had already conceded in its brief before the Court of Appeals that the reports were not evidence. It said that it had never suggested to the lower court that they could contain any evidence. It urged only that they should have been in the record because they were part of the administrative record under review. It had said the same thing in the affidavit in support of the motion to include the reports in the record (R. 699).

Appellant's counsel, in his oral argument before the Court of Appeals, expressly disclaimed any contention that the reports could possibly contain any evidence. That was

before that court, over the protest of appellant's counsel, obtained copies of the reports.

Clearly, the Court of Appeals was not being frank when it said that the "reports were examined to determine whether they contained evidentiary matter" (R. 703).

The Law As to the Denial of Due Process

Appellant submits that it is wrong for a judicial tribunal, before rendering its decision, to examine admittedly relevant and unprivileged documents which it receives from the attorney for one of the parties without disclosing the contents of those documents to the adversary's attorney and without requiring their inclusion in the record. The action is the more to be condemned when, as here, the Court, aware of the problem, first asked the consent of appellant's counsel to what it proposed to do and, when counsel refused to consent, did it anyhow (R. 708-709). The action of the court certainly violates reasonable concepts of judicial impartiality. It should be considered a denial of due process of law within the meaning of the Fourteenth Amendment.

As hereinbefore noted, the case is one of first impression and there is no authority directly in point. In *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, a federal court of appeals had appointed a special master to investigate into the circumstances surrounding a judgment allegedly obtained in that court through fraud. In the course of his investigation the master read grand jury records, records in the possession of the United States Attorney, bank records and statements of interested parties; but he did not permit the alleged wrong doer to see everything that he had read. This Court noted the fact with disapproval (328 U. S. 578-579) but reversed on another ground.

The closest case which appellant has found is *Mazza* v. *Cavicchia*, 15 N. J. 498, 105 A. 2d 545. In an administrative proceeding before the New Jersey Division of Alcoholic Beverage Control a hearing had been conducted before a "hearer" in the Division, who forwarded the record of the hearing and report of his findings and conclusions to the Director of the Division. Without disclosing the hearer's report to Mazza, the Director ordered his license suspended.

Through judicial proceedings similar to those here, Mazza carried the case to the Appellate Division of the Superior Court, which affirmed. In the New Jersey Supreme Court, he urged reversal because he had not been given a copy of the hearer's report and findings and conclusions. The Supreme Court reversed in an opinion by Chief Justice Vanderbilt saying in part:

> "The crucial point in the pending appeal is whether the failure to supply the appellant with a copy of the hearer's secret report to the Director constitutes reversible error." (15 N. J. 511, 105 A. 2d 553).
>
> * * *
>
> "We have not been able to find a single case in any state of the Union, nor have any been cited to us, justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency. To approve such a practice in deciding an administrative controversy would be to confer on New Jersey the dubious distinction of being the only jurisdiction in the United States to ignore a fundamental element of due process and fair play." * * * (15 N. J. 519, 105 A. 2d 557)

The opinion is a lengthy one. In it, Chief Justice Vanderbilt reviews the decisions of this Court and concludes that this Court has never in fact passed on the question.

The case is not an exact precedent here inasmuch as the New Jersey court never saw the report which the administrative officer was concealing from the litigant. But if it is a denial of due process for the administrative officer to conceal the report, it would seem a clearer denial of due process for the court to read it and then to participate in the concealment.

Another strikingly similar situation arose in *Application of O'Meally* v. *Rohan, et al.*, 286 App. Div. 872, 142 N. Y. S. 2d 239. That too was a proceeding under Article 78 of the New York Civil Practice Act to review a determination of an administrative officer,—in that case a determination of the New York State Liquor Authority cancelling the petitioner's liquor license.

In setting aside the authority's determination, the court said (286 App. Div. 872-873, 142 N. Y. S. 2d 241):

> "We are also of the opinion that, for the reasons stated in Mazza v. Cavicchia, 15 N. J. 498, 511-526, 105 A. 2d 545, a copy of the hearing commissioner's report should be made available to petitioner, prior to action thereon by the respondents, and an opportunity afforded to controvert its findings or conclusions. See, also, Simmons v. United States, 348 U. S. 397, 75 S. Ct. 397; Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409."

That decision was by a different Appellate Division than the court in which the instant record was first reviewed.

CONCLUSION

This Court has jurisdiction of this appeal under Section 1257(2) of Title 28, United States Code. The federal questions presented are both substantial and novel.

Respectfully submitted,

WILLIAM W. OWENS
Attorney for Appellant

Dated: August 28, 1961

APPENDIX A

The Opinions of the Courts Below

Opinion of Appellate Division on Intermediate Order

8 AD 2d 714, 185 N. Y. S. 2d 838

(May 19, 1959)

By Botein, P. J.: Breitel, M. M. Frank, McNally and Stevens, JJ.

The determination with respect to penalties is annulled and the matter remanded to the Comptroller for his determination concerning what penalties, if any, should be imposed. In all other respects, the determination is confirmed, without costs. The questions presented relate to the validity of (1) the imposition of the tax; and (2) the imposition of the penalty. With respect to the imposition of the tax, we confirm the determination. The imposition of the penalty is not sustained by the record. The returns were timely filed. The deficiency notice is dated July 28, 1950. The application for a hearing is dated August 23, 1950. The hearing commenced on January 12, 1953, and terminated March 16, 1954. The notice of final determination is dated July 11, 1958, and includes penalty interest to February 16, 1956. It thus appears that from the time that the hearing was closed until the taxpayer was informed of the final determination of the tax more than four years elapsed, and the penalty interest imposed relates to two of these four years. While we do not attempt to determine what would constitute a reasonable time for the Comptroller to process the matter after close of hearings, on this record there is no showing that either two or four years is reasonable, and, under these circumstances, the imposition of a penalty measured thereby is unwarranted. We have held that the basis for the imposition of penalties should appear so that it may be reviewed under article 78 of the Civil Practice Act. (Matter of McCall Corp. v. Gerosa, 2 AD 2d 358, 361). Settle order on notice.

Appendix A

Opinion of Appellate Division on Final Order

10 AD 2d 827, 199 N. Y. S. 2d 92
(April 12, 1960)

By BOTEIN, P. J.: RABIN, M. M. FRANK, MCNALLY and STEVENS, JJ.

Determination unanimously confirmed and the petition dismissed, with $20 costs and disbursements to the respondent. The reports sought to be made part of the record by petitioner contain no evidentiary matter and merely represent opinions of subordinates which the Comptroller was not bound to follow. Order filed.

Opinion of Court of Appeals on Final Order and on Motion to Include the Referees' Reports in the Record

9 NY 2d 750 (March 2, 1961)

Orders affirmed, with costs; no opinion.

Motion for an order requiring the inclusion of two Referees' reports in the record on appeal denied.

Opinion of Court of Appeals on Motion to Amend Decision to Recite what had Occurred on Oral Argument before that Court

9 NY 2d 792 (March 23, 1961)

Motion to amend remittitur granted to the following extent: Return of remittitur requested and, when returned, it will be amended to state that the reports in question were examined by the court to determine whether they contained evidentiary matter and should have been included in the record. The court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrelevant to a decision of the controversy. Otherwise motion is denied.

APPENDIX B

The Statutes Involved

Chapter 338, Laws of 1946—The State Legislative Act under the Authority of which New York City Local Law No. 14 of 1946 was Enacted

CHAPTER 338

Section 1. Article two-B of chapter twenty-six of the laws of nineteen hundred nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," consisting of sections twenty-four-a, twenty-four-b and twenty-four-c, such article having been added by chapter one hundred ninety-nine of the laws of nineteen hundred forty-one and section twenty-four-a thereof having been last amended by chapter six hundred ninety-six of the laws of nineteen hundred forty-five, is hereby amended and re-enacted to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses.

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. **Certain cities authorized to impose taxes on certain businesses.** Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, until July first, nineteen hundred forty-nine, shall

have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-tenth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed one-fifth of one per centum of such gross income. In any such city in which the functions of a chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

Section 1. **Definitions.** When used in this local law the following terms shall mean or include: 1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission mer-

chants, and where the chief fiscal officer shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three per centum of the cost of goods sold, and such determination of fact by the chief fiscal officer shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The chief fiscal officer shall determine from such data as he shall require from insurance companies subject to the provisions of this local law, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city, of the state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Appendix B
Chapter 338, New York Laws of 1946

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by section twenty-b of the general city law, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity" does not include labor or services rendered by an individual for a wage or salary.

6. "Sheriff." The sheriff of the county in which a city is located and, in a city containing more than one county, the sheriff of any county within the city.

Appendix B
Chapter 338, New York Laws of 1946

§ 2. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section one of this local law for gain or profit within the city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during any calendar year commencing with the calendar year in which this local law shall take effect, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this local law, by reason of the provisions of the constitution of the United States or any other provision of law, the chief fiscal officer shall establish rules

and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The chief fiscal officer may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision b.

c. If a person subject to the tax imposed by this local law was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this local law measured by his receipts or gross income, as the case may be, during the period of one year subsequent to January first of the calendar year in question and not extending beyond June thirtieth of the year next succeeding such calendar year; and if such person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, of the year in which this local law shall take effect, acquired the assets or franchises, of, or was merged or consolidated with another person, the person liable for the tax shall re-

port as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§ 3. **Presumption and burden of proof.** For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§ 4. **Filing of returns.** Every person subject to tax under this local law, on or before the fifteenth day of June, of each year, commencing with the year next succeeding the year in which this local law shall take effect, annually shall file a return under oath with the chief fiscal officer, except that any person required to file a return for a period beyond the first day of May, preceding the thirtieth day of June terminating a fiscal period, may file such return on or before the first day of August thereof. The chief fiscal officer, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the chief fiscal officer and shall contain such information as he may deem necessary for the proper administration of this local law; and the chief fiscal officer or his duly authorized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this local law pertaining to his receipts.

Appendix B
Chapter 338, New York Laws of 1940

§ 5. **Payment of tax.** At the time of filing a return as required by this local law each person shall pay to the chief fiscal officer the tax imposed by this local law. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§ 6. **Determination of tax.** If a return required by this local law is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the chief fiscal officer, the latter shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the chief fiscal officer for a hearing on such determination, or unless the chief fiscal officer shall of his own motion redetermine such tax. After such hearing the chief fiscal officers shall give notice of his decision to the person liable for the tax. The determination of the chief fiscal officer shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been

deposited, and an undertaking filed, with the chief fiscal officer in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§ 7. **Refunds.** In the manner herein provided the chief fiscal officer shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the chief fiscal officer therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the chief fiscal officer. Whenever a refund is made by the chief fiscal officer, on his own initiative or after a hearing by him, as herein provided, he shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section six of this local law. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the chief fiscal officer as provided in section six of this local law, unless the chief fiscal officer, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the civil practice act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as provided upon the determination of such proceeding. An application to the chief fiscal officer for a re-

fund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the chief fiscal officer shall receive evidence with respect thereto. After making his determination the chief fiscal officer shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the chief fiscal officer in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the civil practice act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section six of this local law, the chief fiscal officer shall set up appropriate reserves to meet any decision adverse to the city.

§ 9. **Remedies exclusive.** The remedies provided by sections six and seven of this local law shall be the exclusive remedies available to any person for the review of tax liability imposed by this local law; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money

had and received, or by any legal or equitable action proceeding other than proceedings under article seven eight of the civil practice act; provided, however, tha taxpayer may proceed by declaratory judgment if he stitutes suit within thirty days after a deficiency assessm is made and pays the amount of the deficiency assessment the chief fiscal officer prior to the institution of such s and posts a bond for costs as provided in section six this local law.

§ 10. **Proceedings to recover tax.** a. Whenever a person shall fail to pay any tax, penalty, or interests posed by this local law, as herein provided, the chief officer shall, upon the request of the chief fiscal officer, br an action to enforce payment by the taxpayer, who shall personally liable for the same. If, however, the chief fis officer in his discretion believes that a taxpayer subj to the provisions of this local law is about to cease busine leave the state or remove or dissipate the assets out which the tax, interest or penalties might be satisfied a that any such tax, interest or penalty will not be paid wh due, he may declare such tax, interest or penalty to immediately due and payable and may issue a warr immediately.

b. As an additional or alternative remedy the ch fiscal officer may issue a warrant, directed to the she commanding him to levy upon and sell the real and perso property of such person which may be found within county, for the payment of the amount thereof, with penalties, interest and the cost of executing the warr and to return such warrant to the chief fiscal officer to pay him the money collected by virtue thereof wit sixty days after the receipt of such warrant. The she shall within five days after the receipt of the warrant,

with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the chief fiscal officer a warrant of like terms, force and effect may be issued and directed to any officer or employee of his office, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the chief fiscal officer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 11. **General powers of the chief fiscal officer.** In addition to the powers granted to the chief fiscal officer in this local law, he is authorized and empowered:

1. to make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and

other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this local law to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per centum per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy or other employee or employees of his office;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transactions had;

8. To prescribe methods for determining allocations of receipts to the city.

§ 12. **Administration of oaths and compelling testimony.** a. The chief fiscal officer or his employee duly designated and authorized by him shall have power to

administer oaths and take affidavits in relation to any matter or proceeding in the exercise of his powers and duties under this local law. The chief fiscal officer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the chief fiscal officer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the chief fiscal officer hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the chief fiscal officer's summons or subpoena hereunder, and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the chief fiscal officer within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax

due, plus interest at the rate of one per centum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the chief fiscal officer, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six per centum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this local law.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is wilfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section eleven of this local law shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the chief fiscal officer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

§ 14. Notices and limitations of time. a. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application

made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the civil practice act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest, or penalty provided by this local law. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§ 15. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the chief fiscal officer or any officer or employee of his office, to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the

custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of any other city of the state authorized to impose a tax pursuant to section twenty-four-a of the general city law or on behalf of the state, the city or the chief fiscal officer or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the chief law officer of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the chief fiscal officer orders them destroyed.

§ 16. **Separability.** If any provision of this local law or the application thereof to any person or circumstance is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 17. **Construction and enforcement.** This local law shall be construed and enforced in conformity with section

twenty-four-a of the general city law, pursuant to which this local law is enacted.

§ 24-b. **Authority to impose other taxes; limitations.** Nothing in this article contained shall limit the power of any city to adopt or amend local laws imposing the tax authorized by section twenty-b of this chapter, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Nothing in this article contained shall be construed to refer to or authorize a tax such as is authorized to be imposed by subdivision b of section one of chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as last amended, upon (a) the gross income of persons subject to the supervision of either division of the department of public service; (b) the gross income of persons engaged in the business of operating or leasing sleeping and parlor railroad cars or operating railroads other than street surface, rapid transit, subway and elevated railroads; (c) the gross operating income of persons engaged in the business of operating omnibuses with a carrying capacity of more than seven persons who are not subject to the supervision of either division of the department of public service; (d) the gross income of persons constructing, owning, operating, managing or leasing electrical subways, conduits, ducts, subsidiary connections or similar structures and equipment upon, above, or under any public or private street, public or private avenue, highway, public or private place, road or ground in any such city, through which are run electrical conductors, either low or high tension, by itself, or by any person engaged in the business of affording telephonic or telegraphic communication for hire or in the business of manufacturing, generating, distributing or transmitting electricity; or (e) the gross operating income of persons not subject to the supervision of either

division of the department of public service but furnishing or selling gas, electricity, steam, water, refrigeration, telephony or telegraphy, or furnishing or selling gas, electric, steam, water, refrigeration, telephone or telegraph service, or operating omnibuses (whether or not such operation is on the public streets), regardless of whether such furnishing or selling or operation constitutes the main activity of such person or is merely incidental thereto.

§ 24-c. **Revenues; disposition of.** Revenues resulting from the imposition of taxes authorized by this article two-b shall be paid into the treasury of the city imposing the same and may be credited to or deposited in the general fund of such city.

§ 2. This act shall take effect immediately.

NEW YORK CITY LOCAL LAW NO. 14 OF 1946

Under which Appellant's Gross Receipts in 1946 and 1947 were taxed

Section 1. Title RR of chapter forty-one of the administrative code of the city of New York, as added by local law number forty-seven for the year nineteen hundred forty-one, and as last amended by local law number nineteen for the year nineteen hundred forty-five, is hereby amended to read as follows:

TITLE RR

GENERAL BUSINESS AND FINANCIAL TAX

§ RR41-1.0 **Definitions.**—When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate,

receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received, in or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipt from the sales, services or transactions hereinafter in schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts

and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the Banking Law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the Co-operative Corporations Laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

Appendix B
New York City Local Law No. 14 of 1946

A broker who initiates, executes or clears a purchase or sales contract in conjunction with another broker may deduct from gross income any commissions paid by him to such other broker.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer." The treasurer of the city.

§ RR41-2.0 **Imposition of tax.**—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-twentieth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-tenth

of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-six and ending with June thirtieth, nineteen hundred forty-nine, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-six, nineteen hundred forty-seven and nineteen hundred forty-eight, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-six, and ending with June thirtieth, nineteen hundred forty-nine, every person shall pay an excise tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-six, nineteen hundred forty-seven, and nineteen hundred forty-eight, or as provided in subdivision c hereof. However, there shall be no tax im-

posed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year, commencing on a date subsequent to January first of the calendar year in question and not extending beyond June thirtieth of the year next succeeding such calendar year; and if such

person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred forty-one, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§ RR41-3.0 **Presumption and burden of proof.**—For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§ RR41-4.0 **Filing of returns.**—Every person subject to tax under this title shall on or before the fifteenth day of June of each of the years nineteen hundred forty-two to nineteen hundred forty-nine, file returns embracing the receipts for each day of the calendar year nineteen hundred forty-one to and including nineteen hundred forty-eight, respectively, under oath with the treasurer, except that any person required by the provisions of subdivision c of section RR41-2.0 to file a return for a period beyond the first day of May following any of the calendar years

hereinabove in this section mentioned, may file such return on or before the first day of August thereafter. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or his duly authorized agents or employees shall be empowered to require supplemental returns. Whenever the comptroller shall require supplemental returns, he shall promptly notify the treasurer thereof. If a return required by this title, by title O, by title R, by articles eight to twelve, inclusive, of title E of chapter forty-one of the code or by local law number four for the year nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient on its face the treasurer shall take the necessary steps to enforce the filing of such a return or of a corrected return.

§ RR41-5.0 **Payment of tax.**—At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§ RR41-6.0 **Determination of tax.**—If a return required by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or

sufficient return within twenty days after the same may be required by notice from the comptroller, the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations.

§ RR41-7.0 **Refunds.**—In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or

unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section RR41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section RR41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as provided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with

the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ RR41-8.0 **Reserves.**—In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund or has deposited the amount of tax assessed in connection with proceedings under section RR41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§ RR41-9.0 **Remedies exclusive.** — The remedies provided by sections RR41-6.0 and RR41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or proceeding other than a proceeding under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the

treasurer prior to the institution of such suit and posts a bond for costs as provided in section RR41-6.0 of this title.

§ RR41-10.0 **Proceedings to recover tax.**—a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provisions of this title is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the city sheriff, commanding him to levy upon and sell the real and personal property of such person which may be found within the city, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The city sheriff shall within five days after the receipt of the warrant, file with the county clerk a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed

shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The city sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee or the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

c. Whenever there is made a sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or of fixtures, or merchandise and of fixtures pertaining to the conducting of the business of the seller, transferrer or assignor, otherwise than in the ordinary course of trade and in the regular prosecution of said business, the purchaser, transferee or assignee shall at least ten days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notify the comptroller by registered mail of the proposed sale and of the price, terms and conditions thereof, whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that

it owes any tax pursuant to this title, title O, title R, or articles eight to twelve, inclusive, of title E of chapter forty-one of the code or local law number four for the year nineteen hundred thirty-eight, whether or not the purchaser, transferee or assignee has knowledge that such taxes are owing, and whether or not any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give the notice to the comptroller required by the preceding paragraph, or whenever the comptroller shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the city, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the city's claim. For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of section forty-four of the Personal Property Law, shall be personally liable for the payment to the city of any such taxes theretofore or thereafter determined to be due to the city from the seller, transferrer or assignor and such liability may be assessed and enforced in the same manner as the liability for tax is imposed under this title.

§ RR41-11.0 **General powers of the comptroller.**— In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

Appendix B
New York City Local Law No. 14 of 1946

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days, in which case he shall notify the treasurer thereof; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller and other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale

made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§ RR41-12.0 **General powers of the treasurer.**—In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§ RR41-13.0 **Administration of oaths and compelling testimony.**—a. The comptroller or treasurer or his employee duly designated and authorized by him shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of

his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the city sheriff, and his duly appointed deputies, or any officers or employees of the office of the comptroller or of the treasurer, designated to serve such process.

§ RR41-14.0 **Penalties and interest.**—a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of

tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or co-partnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section RR41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the treasurer to the effect that a tax has not been paid, that a return has not been filed or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§ RR41-15.0 **Notices and limitations of time.**—a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or

in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax imposed under a local law enacted subsequent to July first, nineteen hundred thirty-eight shall be made after the expiration of more than three years from the date of the filing of a return provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§ RR41-16.0 **Returns to be secret.**—Except in accordance with proper judicial order or as otherwise provided

by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller and treasurer permit them to be destroyed.

§ RR41-17.0 **Separability.**—If any provision of this title, or the application thereof to any person or circumstances is held invalid, the remainder of this title, and the

application of such provisions to other persons or circumstances shall not be affected thereby.

§ RR41-18.0 **Construction and enforcement.**—This title shall be construed and enforced in conformity with sections twenty-four-a, twenty-four-b, and twenty-four-c of the General City Law, pursuant to which it is enacted.

§ 2. This local law shall take effect July first, nineteen hundred forty-six.

Chapter 489, Laws of 1948—The State Legislative Act under the Authority of which New York City Local Law No. 44 of 1948 was Enacted

[Except for the portions set forth below, which have the effect of doubling the maximum permissible rate of tax, this statute is identical to Chapter 338, New York Laws of 1946, *supra* pp. 31-49]

CHAPTER 489

Section 1. Article two-B of the general city law, consisting of sections twenty-four-a, twenty-four-b and twenty-four-c, such article having been added by chapter one hundred ninety-nine of the laws of nineteen hundred forty-one and last amended by chapter three hundred thirty-eight of the laws of nineteen hundred forty-six, is hereby amended and re-enacted to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses.

Appendix B
Chapter 489, New York Laws of 1948

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. *Certain cities authorized to impose taxes on certain businesses.* Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-fifth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed two-fifths of one per centum of such gross income. In any such city in which the functions of a chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

* * * * * *

§ 2. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity

other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section one of this local law for gain or profit within the city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during any calendar year commencing with the calendar year in which this local law shall take effect, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

* * * * * *

NEW YORK CITY LOCAL LAW No. 44 OF 1948

Under which Appellant's Gross Receipts in 1948 were taxed

Section 1. Subdivision a of section RR41-2.0 of title RR of chapter forty-one of the administrative code of

the city of New York, as last amended by local law number fourteen for the year nineteen hundred forty-six, is hereby amended to read as follows:

a. For the privilege of carrying on or exercising for gain or profit within the city, any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-twentieth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or com-

mercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-six and ending with June thirtieth, nineteen hundred forty-eight, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-six and nineteen hundred forty-seven, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivison two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-six, and ending with June thirtieth, nineteen hundred forty-eight every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-six and nineteen hundred forty-seven, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

§ 2. Section RR41-4.0 of chapter forty-one of the said administrative code, as last amended by local law number fourteen for the year nineteen hundred forty-six, is hereby amended to read as follows:

Appendix B
New York City Local Law No. 44 of 1948

§ RR41-4.0 **Filing of returns.**—Every person subject to tax under this title shall on or before the fifteenth day of June of each of the years nineteen hundred forty-two to nineteen hundred forty-eight, file returns embracing the receipts for each of the calendar years nineteen hundred forty-one to and including nineteen hundred forty-seven, respectively, under oath with the treasurer, except that any person required by the provisions of subdivision c of section RR41-2.0 to file a return for a period beyond the first day of May following any of the calendar years hereinabove in this section mentioned, may file such return on or before the first day of August thereafter. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or his duly authorized agents or employees shall be empowered to require supplemental returns. Whenever the comptroller shall require supplemental returns, he shall promptly notify the treasurer thereof. If a return required by this title, by title O, by title R, by articles eight to twelve, inclusive, of title E of chapter forty-one of the code or by local law number four for the year nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient on its face the treasurer shall take the necessary steps to enforce the filing of such a return or of a corrected return.

§ 3. Such code is hereby amended by adding thereto a new chapter, to follow chapter forty-five, to be chapter forty-six, to read as follows:

Appendix B
New York City Local Law No. 44 of 1948

CHAPTER 46

Special City Taxes

TITLE B

General Business and Financial Tax

[What follows is a redesignation of former title RR of chapter 41 of the Administrative Code of the City of New York by making it title B of Chapter 46. Except for the portions set forth below, which double the tax and prescribe its effective date, and except that each section number is preceded by "B46" instead of by "RR41", this part is identical to New York City Local Law No. 14 of 1946, *supra* pp. 49-69.]

* * * * * *

§ B46-2.0 **Imposition of tax.**—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section B46-1.0 of this title, for gain or profit within the city for each of the periods of one year,

or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

* * * * * *

§ B46-6.0 **Determination of tax.**—If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller, the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be review-

able for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations.

* * * * *

§ B46-18.0 **Construction and enforcement.**—This title shall be construed and enforced in conformity with sections twenty-four-a, twenty-four-b, and twenty-four-c of the General City Law, pursuant to which it is enacted.

§ 4. This local law shall take effect July first, nineteen hundred forty-eight.

APPENDIX C

Orders Appealed From

Order of Remittitur

COURT OF APPEALS

STATE OF NEW YORK

STATE OF NEW YORK, SS.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 2, 1961

No. 308

In the Matter of

the Application of TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Respondent,

for an Order &c.

Appendix C
Order of Remittitur

BE IT REMEMBERED, That on the 23rd day of September in the year of our Lord one thousand nine hundred and sixty, Twentieth Century-Fox Film Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Royall, Koegel, Harris & Caskey, its attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, his attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William W. Owens, of counsel for the appellant—, and by Mr. Morris L. Heath, the counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed, with costs. And thereafter a motion to amend the remittitur having been granted this remittitur is amended to the extent that the following is added: The reports in question were examined by the Court to determine whether they contained evidentiary matter and should have been included in the record. The Court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrevelant to a decision of the controversy. Otherwise, motion denied.

Appendix C
Order of Remittitur

AND thereafter a further motion to amend the remittitur having been granted this remittitur is further amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that the taxation of certain gross receipts of appellant in the calendar years 1946, 1947 and 1948 under Local Laws, 1946, No. 14 and 1948, No. 44 of City of New York was in violation of clause 2 of section 10 of Article I of the Constitution of the United States. The Court of Appeals held that there was no such violation.

AND it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders be affirmed, with costs &c., as aforesaid.

AND hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
—Albany, March 2, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

Appendix C

Final Order On Remittitur

At a Special Term of the Supreme Court of the State of New York, Part II thereof, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on April 14th, 1961.

Present:

HON. WILLIAM C. HECHT, JR.,
Justice.

Index Number 9908-1958

In the Matter of the Application of

TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

Plaintiff having appealed to the Court of Appeals of the State of New York from the intermediate order of the Appellate Division of the Supreme Court of the State of New York in and for the First Department dated June 10, 1959 and entered in the office of the clerk of this court on June 18, 1959, and from the final order of the said Appellate Division

dated April 12, 1960 and entered in the office of the clerk of this court on April 26, 1960, and the Court of Appeals having decided the said appeals and there having been filed in the office of the clerk of this court on April 3, 1961 the remittitur dated March 2, 1961 from the said Court of Appeals wherein and whereby the said Court of Appeals affirmed with costs the orders of the appellate division so appealed from and granted in part and denied in part petitioner's motion to amend the remittitur, it is

ORDERED that the aforesaid orders of the Court of Appeals be, and the same hereby are, made the orders of this court.

ENTER,

/s/ W. C. H., Jr.
J. S. C.

Appendix C

Final Order On Remittitur

At a Special Term, Part II of the Supreme Court held in and for the County of New York at the County Courthouse in said County on the 23rd day of March, 1961.

PRESENT:

HON. THOMAS A. AURELIO,
Justice.

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner-Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

The petitioner-appellant having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department as resettled by the order of said Court dated April 25, 1960, and entered in the Office of the Clerk of said Appellate Division on or about the 25th day of April, 1960, and from the intermediate order of the said Appellate Division entered in the Office of the Clerk of said Appellate Division on or about the 10th day of June, 1959, in so far as said order

approved and confirmed the determination of the respondent herein with respect to petitioner's liability for general business tax, and the appeal having been duly argued at the Court of Appeals and that Court in an order dated the 2nd day of March, 1961, having ordered and adjudged that the orders of the Appellate Division of the Supreme Court so appealed from be affirmed with costs and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court there to be proceeded upon according to law.

Now upon reading and filing the remittitur from the Court of Appeals and on motion of CHARLES H. TENNEY, Corporation Counsel, attorney for respondent, it is

ORDERED that the order and judgment of the Court of Appeals be and the same hereby is made the order of this Court, and it is further

ORDERED that the respondent, Lawrence E. Gerosa, as Comptroller of the City of New York (Municipal Building, New York City) recover of the petitioner-appellant, Twentieth Century-Fox Film Corporation (444 West 56th Street, New York City) the sum of $278.93 costs as taxed and that said respondent have execution therefor, and it is further

ORDERED that the Clerk of the County of New York be and he hereby is directed to docket this order as a judgment.

ENTER

T. A. A.
J. S. C.

Appendix C

Order Denying Motion to Include Referees' Reports in the Record

COURT OF APPEALS

STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of March A. D. 1961.

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 76

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent.

A motion having heretofore been made herein upon the part of the appellant for an order requiring the inclusion of two Referees' Reports in the record on appeal in the above cause and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C
Order Denying Motion to Include Referees' Reports in the Record

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL OF COURT OF APPEALS
STATE OF NEW YORK]

GEARON KIMBALL
Deputy Clerk

Appendix C

Order On Motion to Amend Remittitur to Recite What Had Occurred On Oral Argument

IN COURT OF APPEALS

OF THE STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of March A. D. 1961.

PRESENT:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 198

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order &c.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted to the following extent: Return of the remittitur

Appendix C
Order On Motion to Amend Remittitur to Recite What Had Occurred On Oral Argument

requested and, when returned, it will be amended to state that:

> the reports in question were examined by the Court to determine whether they contained evidentiary matter and should have been included in the record. The Court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrelevant to a decision of the controversy.

AND the Supreme Court of the County of New York is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly; and it is

FURTHER ORDERED; That the said motion is otherwise denied.

RAYMOND J. CANNON
Clerk

A COPY

[SEAL OF COURT OF APPEALS
STATE OF NEW YORK]

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(36557)

Office-Supreme Court, U.S.
FILED
SEP 27 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

IN THE MATTER OF THE APPLICATION OF

TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

MOTION TO DISMISS APPEAL

LEO A. LARKIN,
Counsel for Appellee.

STANLEY BUCHSBAUM,
MORRIS L. HEATH,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

In the Matter of the Application of

TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York, dated March 2, 1961, unanimously affirming two orders of the Appellate Division of the Supreme Court of that State.

The decisions of the Court of Appeals are reported in 9 N. Y. 2d 750, 174 N. E. 2d 535 and 9 N. Y. 2d 792, 175 N. E. 2d 163. The decisions of the Appellate Division are

reported in 8 A. D. 2d 714, 185 S. 2d 838 and 10 A. D. 2d 827, 199 S. 2d 92.

On this appeal the appellant contends that the Import-Export Clause (Art. I, Sec. 10, Cl. 2) of the Federal Constitution bars the City of New York from imposing its general business tax upon appellant, to the extent that it is measured by appellant's gross receipts received from film distributors under contracts by which appellant licensed the distributors to exhibit its films in foreign countries, where the distributors exported the film prints and paid over to appellant a share of the receipts from the exhibition of the films.

Appellant also contends that the Court of Appeals of the State of New York denied it due process of law in violation of the Fourteenth Amendment when, upon the argument of the appeal, it examined certain reports furnished by the appellee and ruled that they should not be included in the record, without disclosing them to the appellant.

Appellee moves to dismiss both phases of the appeal on the ground that they do not present substantial federal questions.

Statutes Involved

The statutes under which the tax is imposed are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul a determination of the Comptroller of the City of New York, appellee herein, assessing appellant with New York City general business taxes for the period

from July 1, 1946 to June 30, 1949, in the total principal amount of $37,546.03, plus penalties and interest of $31,880.23, making a total of $69,426.26.

The determination under review was made as the result of a hearing held by the appellee at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case. In this case the following proceedings occurred:

Following the administrative hearing held in the office of the appellee he issued a determination assessing tax, penalties and interest against the appellant. Appellant commenced an Article 78 proceeding to review the determination in the Appellate Division of the State Supreme Court, contending that the tax was invalid under the Import-Export Clause, and that the penalties were unlawful and should have been reduced by the appellee to simple interest. The Appellate Division confirmed the determination as to the tax, but annulled it as to the penalties, remanding the matter to the appellee to determine what penalties, if any, should be imposed.

Following a hearing on the remand (limited to the penalties question), the appellee issued a determination affirming the penalties in part. Appellant sought review of this determination in the Appellate Division, which confirmed the determination.

Upon appeal, the Court of Appeals, without opinion, unanimously affirmed the decisions of the Appellate Division, sustaining the tax, penalties and interest as assessed.

At the aforementioned remand hearing on the penalties question appellant specifically asked that the report of the referee in the appellee's office who had conducted the original hearing be made part of the record, which request was refused (fols. 1715-1724). On review, appellant requested

the Appellate Division to require the production of that report and of the report of the referee who conducted the remand hearing (fols. 1627-1628; Pet's Reply Br. on review of remand hearing, p. 7). That Court sustained the ruling of the appellee, stating that such reports contain no evidentiary matter and merely represent opinions of subordinates which the appellee was not bound to follow (Juris. Statement, p. 30).

On the appeal to the Court of Appeals, the appellant asked that Court to direct the appellee to include in the record the reports of the referees who conducted both the original and remand hearings (fols. 2032-2033). On the argument of the appeal in that Court, counsel for the appellee was directed to submit those reports to the Court, which examined them and held that they need not be made a part of the record as they merely represented opinions of subordinates of the appellee and were irrelevant to a decision of the controversy (Juris. Statement, p. 30).

Facts

(1)

Appellant is a New York corporation engaged in business as a motion picture producer, with its principal place of business in the City of New York and a studio in Los Angeles (fols. 567-568, 847-849). The receipts here in issue were received by appellant in the City of New York from two film distributors, Twentieth Century-Fox International Corporation and Twentieth Century-Fox Inter-America, Inc., which were subsidiaries of appellant also having their principal offices in the City of New York (fols. 186-187, 717, 847, 928).

(2)

The contracts between appellant and the distributors were made by the parties in New York City and are en-

titled "Motion Picture Purchase and Sale Agreement" (fols. 844, 847-848, 896, 925, 928-929, 977). They provide that appellant sells to the distributor (fols. 851, 932):

> "its sole and exclusive right under copyright * * * and * * * the sole and exclusive right to exhibit and to resell the right to exhibit within and throughout the said (foreign) Territory"

motion picture productions released or controlled by appellant.

Appellant also agrees to deliver to the distributor the necessary film prints, such delivery to consist of "delivery to International (or to Inter-America) at its principal office in the City of New York, or other port or embarkation point," as designated by appellant; the delivery to be "f.o.b. New York or other port" as designated by appellant (fols. 859-860, 877, 939-940, 958).

The distributor agrees that, upon such delivery of the productions, it (the distributor) shall undertake their distribution throughout the licensed Territory to the extent that it (the distributor) "shall deem to be commercially profitable" (fols. 862-864, 942-944). The distributor agrees to release such productions in the countries of the Territory (fols. 865, 945):

> "within a reasonable time after delivery of each of said productions to International (or Inter-America), taking into consideration the present practices, existing laws and prevailing customs in each of said countries."

The distributor agrees to pay to appellant "for the sale to it of the aforesaid sole and exclusive right to exhibit and to resell the right to exhibit" appellant's productions in the foreign territory, a specified share of all moneys "received by (the distributor) from the exhibition of and

from the resale of the right to exhibit" the productions (fols. 868-871, 948-952).

In addition, the distributor agrees to pay to appellant the cost of the prints and to pay all distribution costs, such as shipping charges, customs, duties, etc. (fols. 872-873, 953-954).

It is further agreed that all moneys due appellant under the contract shall be paid to it "at its office in New York City by weekly remittances on account in United States dollars" (fols. 877, 958-959).

Finally, the parties agree that the contract is intended "as simply a purchase and sale agreement"; that the appellant is not to be liable for, or bound by, any representations, acts or omissions of the distributor, which is not to be deemed an agent or representative of appellant; and that the agreement is not to constitute a partnership or joint adventure between the parties (fols. 884-886, 966-967).

(3)

In performing the contract the distributor entered into contracts with distributing companies located in foreign countries, under which the distributor rented the film to the foreign distributors in exchange for a percentage of the receipts (fols. 370-374, 379-380). The foreign distributors in turn rented the films to theatre companies in the foreign countries for exhibition, crediting the distributor in New York City with its share of the proceeds and periodically transferring cash to such distributor (fols. 376-377, 380-382, 392-393).

The appellant and the distributor in New York City maintained inter-company accounts showing the amount of money owing by one to the other, through which the distributor paid the amounts owed to appellant "with cash settlements regularly, at least once a month" (fols. 354-355, 715-719, 771-772, City's Exh. O, p. 485).

(4)

Both black and white films and color films were distributed under these agreements (fol. 161).

In the case of black and white films, the distributor in New York City would order the prints from De Luxe Laboratories, Inc., a subsidiary of appellant engaged in business as a commercial processor of motion picture films and also located in New York City (fols. 160-164, 190, 216, Txp's Exh. 7, p. 329). The prints were made by De Luxe from a negative furnished by the appellant (fols. 208-209). When made, De Luxe delivered the prints to its shipping department and notified the distributor (fols. 151, 540-543). The distributor then issued shipping instructions to the De Luxe shipping clerk, whereupon De Luxe packed the prints for shipment and submitted the packing list to the distributor's billing department and foreign service department (fols. 543-545).

The distributor then prepared invoices for the prints directed to the foreign customer (which invoices showed the distributor as the seller), and sent the packing list to a shipping broker which booked the shipment on a carrier and advised the De Luxe shipping department to deliver the prints to the carrier (fols. 545-551).

In the case of color film the distributor ordered the prints from a technicolor motion picture corporation in Hollywood, directing it to ship the prints to De Luxe Laboratories, Inc., which acted as the distributor's "shipping depot" (fols. 161-165, 170, 221-222). The shipping of such prints to foreign countries was made in the same manner as black and white prints (fol. 171).

(5)

The record reveals that, in actual practice, many of the prints (both black and white and color prints) were not shipped abroad until some time after De Luxe Labora-

tories, Inc. had notified the distributor that they were ready. A good many such prints were placed in storage by the distributor and were not shipped out until later.

In ordering color film the distributor usually ordered a number of extra prints to be held in reserve (fols. 183, 459-460). When these arrived at De Luxe Laboratories, the distributor directed them to be delivered by De Luxe to a storage warehouse in New Jersey operated by an independent concern named Bonded Film Storage, Inc., which stored them until the distributor needed them, at which time they were returned to De Luxe in New York City for shipment under instructions from the distributor (fols. 471-472, 556-558, 669-671). The distributor paid the storage charges for these prints directly to the storage concern (fol. 672).

During the tax period, 1946-1948, the distributor did not order black and white film prints for reserve, as De Luxe could supply prints on reorder quickly (fols. 613-614). The distributor, however, caused black and white film prints to be held in storage for a number of reasons (fols. 461-463, 472-473, 639-643, 677-678).

One example of this was a situation that developed in connection with the distribution of films in Greece in 1951, which was stated to be typical of what occurred in the tax period, 1946-1948 (fols. 645-648). On June 22, 1951 the distributor obtained from De Luxe two black and white prints of a film entitled "The Frogmen" for shipment to Greece, which were not shipped out until almost four months later, on October 11, 1951 and which, in the interim, were held by the distributor in storage (fols. 510-512; City's Exh. L, p. 477).

After holding them in storage for this period, the distributor, by a letter dated October 11, 1951, directed its warehouse to return the two prints "to our Traffic Department" and to remove them "from our inventory"

(fol. 814; City's Exh. T, p. 512). At the same time it advised De Luxe that it had recalled the prints from storage and instructed De Luxe to ship them to Greece (*id.*, p. 513).

(6)

The following statements of fact contained in the Jurisdictional Statement are misleading in that they suggest that appellant, rather than the distributors, exported the film prints.

(a)

Appellant asserts that the film was "shipped by appellant from New York City to such foreign countries" (Juris. Statement, p. 9), a statement contrary to the terms of the contracts and refuted by the testimony. The contracts require the distributors to make such shipments at their own expense (fols. 862-864, 873, 942-944, 954). And, as we have shown, in practice the shipments were made at the direction of the distributor, in the distributor's name, and in accordance with contracts entered into between the distributor and concerns in the foreign territory (fols. 370-371, 543-544, 549-551).

Appellant cites pages 55-58, 73-74, 267-276 of the record and Exhibits 3, 4 and 5, in support of its assertion.

At pages 55-58, Mr. Klor, an employee of the distributors, stated that the prints were physically shipped by the shipping department of De Luxe Laboratories, Inc., and that such shipments were made under shipping instructions given by him (*i.e., the distributor*) to De Luxe (fol. 167).

At pages 73-74, Mr. Freedman, president of De Luxe Laboratories, Inc., stated that De Luxe packed the prints and delivered them to the carriers for export. He in no way indicated that appellant shipped them.

At pages 267-276, Mr. Klor and Mr. Freedman testified regarding certain technicolor film prints and matrices

which are not even in issue in this proceeding. The items were shipped directly to foreign countries from the technicolor laboratories in California, and no tax has been assessed against appellant with respect to those transactions in the final determination (fols. 59-60, Txp's. Exh. 20).

Exhibits 3, 4 and 5 are the contracts between appellant and the distributors, which, as we have indicated, place the responsibility for shipping the film on the distributors rather than on appellant.

(b)

Appellant asserts that "In no instance were the black and white films delivered to International or to Inter-America in the United States or stored by them in the United States" (Juris. Statement, pp. 11-12), citing pages 56, 73-74, 205 and 219 of the record.

At page 56 Mr. Klor, and at pages 73-74 Mr. Freedman, testified that De Luxe Laboratories, Inc. did not deliver any film prints to officers or employees of the distributors, or to the premises of the distributors. As we have shown, De Luxe Laboratories, Inc. made delivery to the distributors by delivering the finished prints to its (De Luxe's) shipping department, after which, the distributor would issue instructions to De Luxe with respect to those prints (fols. 540-551).

At pages 205 and 219, Mr. Klor simply stated that the distributors did not order extra black and white prints for reserve. He did not say that such prints were not stored in the warehouse. And there is ample evidence that black and white prints were stored there. For example, City's Exhibit G (p. 472) is an inventory sheet of films in the warehouse (fols. 459-470). Two of the films listed, "Night Without Sleep" and "Don't Bother to Knock", were black and white films (fols. 460-461, 466).

City's Exhibit L is headed "Bonded Film Storage Inventory" and relates to the film, "The Frogmen" (p. 477). "The Frogmen" was a black and white film, the prints of which were kept in storge by the distributor for four months (fols. 510-512).

(c)

Appellant repeatedly asserts that the shipping expenses involved in exporting the film prints were charged by De Luxe Laboratories, Inc. (and by the concern that made the technicolor prints) to appellant and were paid by appellant (Juris. Statement, pp. 11-13). This statement creates the impression that, despite the contract provisions expressly requiring the distributors to pay the shipping charges (fols. 873, 954), the appellant paid them. The record shows that, in accordance with the terms of the contract, the distributors paid these expenses; appellant's own Disbursement Auditor testifying to that effect (fol. 776), with the appellant's ledger account before him (fols. 585, 715).

Furthermore, as provided in the contracts (fols. 872, 953), the cost of making the prints was also paid by the distributors; De Luxe Laboratories, Inc. and the technicolor concern charging appellant for printing them, and appellant charging that cost to the distributors (fols. 736-737, 768-769).

ARGUMENT

POINT I

The Import-Export Clause does not bar the tax. The receipts which have been taxed are receipts from a sale or lease of rights under local contracts entered into with local customers (distributors). Insofar as the petitioner's receipts may be found to be based on the delivery of film prints to such customers, the transactions did not involve an export since the prints were delivered locally before the customers started them in the stream of foreign commerce.

(1)

Appellant's assertion that the Import-Export Clause bars the tax must be considered in light of the fact that appellant itself did not distribute or export the films in or to foreign countries but, under contracts made with film distributors located in the City of New York, sold or leased the exclusive exhibition rights to such distributors. Appellant simply delivered the film prints to the distributor in the City of New York and the distributor thereafter handled the distribution of the films.

Thus, the receipts do not stem from an export by appellant but from a contract made by it with a distributor located in the City of New York, under which the appellant granted the distributor certain film exhibition rights. The case is similar, in this respect, to *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302, 151 N. E. 2d 170 (1958), app. dism., 358 U. S. 39 (1958), where the same tax was sustained on Mr. Steinbeck's royalties from the sale of his books abroad, the New York court saying that "the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City" (4 N. Y. 2d, at p. 318).

(2)

The question remains whether the fact that the film prints in the present case were exported makes the tax on appellant's receipts a tax on exports such as is barred by the Import-Export Clause. As we have shown, both under the contract and in practice, appellant made the delivery of the prints to the distributor before they became exports and before the process of exportation had begun. Under these circumstances the Import-Export Clause does not bar the tax on appellant's receipts.

This Court has now firmly established the rule that goods produced in this country and thereafter exported are not immune from state taxes by virtue of the Import-Export Clause of the Constitution (Art. 1, Sec. 10, Cl. 2), or from federal taxes by virtue of its companion clause exempting exports from federal tax (Art. 1, Sec. 9, Cl. 5), until they actually become exports.

Even though goods are intended to be exported, and are in fact exported, the immunity from tax does not attach until the export begins.

It has also established the point at which export begins as the time the goods are delivered to a carrier or start moving to foreign shores. We have found no case holding goods to be exports, immune from local taxation, at a point prior to such delivery or movement.

In *Turpin* v. *Burgess*, 117 U. S. 504 (1886), a federal stamp tax of 25 cents per pound on tobacco manufactured for export was sustained on the ground that Article 1, Section 9, Clause 5, of the Constitution does not bar a tax on goods not in the course of exportation, the Court holding that a tax is not invalidated merely because the owner intends to export the goods. The Court deemed decisive its earlier decision in *Coe* v. *Errol*, 116 U. S. 517 (1886), where a state personal property tax had been held valid under the Commerce Clause as applied to logs awaiting

shipment to another state and where the Court had held that such property was subject to tax in the state of origin until actually started in course of transportation to the state of destination or delivered to a common carrier for that purpose (117 U. S. at pp. 506-507).

In *Cornell* v. *Coyne,* 192 U. S. 418 (1904), a federal stamp tax of 1¢ per pound on filled cheese was held valid although the cheese had been manufactured under contracts to export it and was in fact exported, the Court holding that the exemption under Article 1, Section 9, Clause 5 of the Constitution "attaches to the export and not to the article before its exportation" (*id.* at p. 427).

In *Spalding & Bros.* v. *Edwards,* 262 U. S. 66 (1923), a federal tax on the sale of baseball equipment was held invalid under Article 1, Section 9, Clause 5 of the Constitution as applied to a sale of bats and balls by Spalding to a purchaser in Venezuela. The purchase was arranged by the foreign purchaser through a commission merchant in New York City, which gave the order to Spalding with directions to pack the goods for export and deliver them to the export carrier.

The Court stated that while the goods were in process of manufacture they were subject to tax even "if they were intended for export and made with specific reference to foreign wants" (*id.,* at p. 69). On the other hand, it said they would clearly be exempt "after they had been loaded upon the vessel for Venezuela and the bill of lading issued" (*id.*). It then concluded that the export in that case had begun at the time of the sale and delivery of the goods by Spalding, on the ground that the "very act that passed the title and that would have incurred the tax committed the goods to the carrier that was to take them across the sea" (*id.*).

It said that "The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell* v. *Coyne,* 192 U. S. 418" (*id.,* at p. 70).

In *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946), the California sales tax was held invalid, under the Import-Export Clause, as applied to sales of oil by Richfield to the New Zealand government, where delivery was made to a vessel owned by New Zealand "to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer" at Los Angeles; the bill of lading showed Richfield as the shipper and the consignee as a designated naval officer in New Zealand; and Richfield filed the shipper's export declaration with the Collector of Customs.

The Court stated that the certainty that the goods are headed to sea and that the process of exportation has started is normally best evidenced "by the fact that they have been delivered to a common carrier for that purpose." Under the circumstances of the case, however, it stated that the delivery of the oil into the purchaser's vessel was the equivalent of delivery to a common carrier, since there was as little probability "that the oil would be diverted to domestic use" as if a common carrier had been used (*id.*, at pp. 82-83).

It concluded that since the delivery of the oil into the vessel "marked the commencement of the movement of the oil abroad," and was the taxable incident under the sales tax law in question, the tax was void as a tax on "a step in the export process" (*id.*, pp. 83, 84).

In *Empresa Siderurgica* v. *Merced County*, 337 U. S. 154 (1949), the Court explained further what it considered the start of the process of exportation. That was a case involving the imposition of a California property tax on a cement plant in that state that had been sold to a foreign purchaser and was in the process of being dismantled and exported on the tax date.

It was held that the Import-Export Clause did not bar the tax as to any of the plant that had not yet been shipped, even though some of it had been dismantled and crated for shipment.

The Court stated that the test as to when goods enter interstate commerce, as established in *Coe* v. *Errol,* 116 U. S. 517 (1886), should be used to determine when exportation commences under the Import-Export Clause; *i.e.,* that goods are subject to state taxation " 'until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey' " (337 U. S., at p. 156).

Under that test, it said, "it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it" (*id.*). Delivery of packages to the carrier, as in *Spalding,* or of oil to a ship furnished by the purchaser, as in *Richfield,* it said, are sufficient to give tax immunity (*id.,* at pp. 156-157). It then concluded (p. 157):

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."

It held that the part of the plant that had been dismantled for shipment was taxable because "it had not been delivered to any carrier for export or otherwise started on its journey on the tax date;" and the fact that a diversion would entail a breach of contract, that a letter of credit had been deposited and that an export license had been obtained, did not start the process of exportation because "the movement to foreign shores had neither started nor been committed."

Finally, in *Joy Oil Co.* v. *State Tax Commission,* 337 U. S. 286 (1949), it was held that a Michigan personal property tax was valid as imposed on gasoline purchased by a Canadian corporation for export to Canada, but stored

by it in Michigan for a period of 15 months under railroad bills of lading marked "For Export to Canada."

The Court said that the petitioner's intent to export the gasoline, and the fact that it was eventually exported, were not enough to confer immunity from local taxation. It stated that while the gasoline was in storage it might have been diverted to domestic markets "without even breach of any contractual commitment to a foreign purchaser", and concluded that the Import-Export Clause was meant to exempt from local taxation "property being exported" not property "eventually to be exported" (*id.*, at p. 288).

(3)

Before considering whether the appellant may be taxed on the basis of receipts from film prints which were not placed in storage, we shall discuss the question of whether the Import-Export Clause bars the tax insofar as it is based on the stored prints.

It is our view that the constitutional provision clearly does not bar the tax with respect to such film prints. Appellant, when it delivered prints to the distributor, which were then sent to the distributor's warehouse, did not start the articles in the stream of export. It merely made a local delivery to a local customer. The fact that the customer intended ultimately to export the prints and that, under its contract with the appellant, could only exhibit the film in foreign countries, does not, under the decided cases, bar a tax on the appellant. The *Empresa Siderurgica* case (337 U. S. 154), and other cases which we have discussed, establish that "an intent to export" is not enough to bar the tax.

The evidence indicates that the number of film prints placed in storage was substantial. When counsel for the respondent visited the premises of the appellant, an employee of the distributors, Mr. Klor, showed him an

inventory book with about 300 pages in it (fols. 650-652). This related only to films then in storage since inventory sheets were destroyed as soon as all prints of a film were removed from storage (fols. 653-654).

It was testified that from 50 to 70 prints of a film were made for foreign use (fol. 563). Not all of them were placed in storage, but reserve or extra prints, those which were to be superimposed with Spanish and Brazilian titles and those which could not be shipped immediately for one reason or another, were placed in storage (fols. 563-564).

The reasons for delaying immediate shipment, applicable to both technicolor and to black and white prints, were varied. Film prints were stored when the consignee did not have sufficient dollars to pay for the shipment (fols. 468, 639-640) and where the expiration of an import license made it necessary to await the periodic issuance of a new one (fols. 461-463, 640-641). In addition, prints were stored because they were returned from abroad so that they could later be sent to another country, or because a foreign censor had refused to approve them (fols. 466-467, 642-643, 677-678). The distributor would hold such a print in storage while it "tried to find another country willing to take this particular picture" (fols. 642-643).

Some indication of the extent to which prints of a technicolor film were placed in storage can be obtained from the exhibits relating to "Bloodhounds of Broadway" (City's Exhs. J, K, M, pp. 475, 476, 478). Exhibit K lists 38 prints which were placed in the warehouse and Exhibit J lists 4 additional prints which were similarly stored. Exhibit M is a list of prints which, after Spanish titles were superimposed, were sent to the De Luxe Laboratory (fols. 522-523). On this list 2 prints for Chile and 8 prints for Brazil were marked "Hold." This notation means that they were to be sent back to the warehouse

(fols. 525-526). We shall assume that these ten prints had originally been in the warehouse and were returned to it after removal for the superimposition of Spanish titles. Even on this assumption we find that at least 42 prints out of the 50 to 70 made for foreign use were placed in the warehouse and that ten of these were removed from and then returned to the warehouse.

An inventory sheet dealing with another picture shows that 41 of the prints were stored in the warehouse (City's Exh. I, p. 474). Thus, it would appear that far more than a majority of the technicolor prints made for the distributor for exhibition in foreign countries were placed in a warehouse after delivery to the distributor and before shipment abroad. It should be made clear at this point that the distributor, not the appellant, determined whether prints should be stored in the warehouse and that the distributor paid the warehouse charges directly to the warehouse company (fols. 525, 672, 775-776).

This, in and of itself, should be determinative of the tax issue in the present case. While not all of the film prints were placed in storage, the record indicates that far more than half of the technicolor prints were stored and that black and white prints were also placed in the warehouse. The appellant has failed to show to what extent prints were not stored after delivery to its distributor customers and, since the burden of showing that its receipts were not subject to the tax is on the taxpayer, this failure makes it impossible to determine how much of the assessment would be improper even if the tax were barred with respect to unstored prints. *Norton Co.* v. *Dept. of Revenue,* 340 U. S. 534, 537-538 (1951); *Chicago* v. *Willett Co.,* 344 U. S. 574, 578 (1953); *Railway Express Agency* v. *Virginia,* 358 U. S. 434, 436 (1959); *Commissioner* v. *Hansen,* 360 U. S. 446, 468-469 (1959); *Peo. ex rel. Kohlman* v. *Law,* 239 N. Y. 346, 350-352, 146 N. E. 622, 624 (1925); *Matter of Ajax Trucking Company, Inc.* v. *Browne,*

272 App. Div. 1087, 1088, 74 S. 2d 737, 738 (3d Dept., 1947), affd. 298 N. Y. 736, 83 N. E. 2d 144 (1948), app. dism. 337 U. S. 951 (1949).

(4)

Moreover, it is our contention that even the unstored film prints were not placed in the export stream by the appellant.

We shall assume that appellant did not make delivery and did not comply with its obligations under the contracts until prints of a film were delivered to the distributor. In this connection we shall assume that De Luxe Laboratories acted as an agent for the appellant in making the prints.

The record, however, appears to establish that De Luxe was acting for the distributor, not for the appellant, when it delivered the prints to the carriers for shipment abroad. The contracts provide for delivery by appellant to the distributor "f.o.b. New York" (fols. 877, 958). They provide that the cost of making prints, etc. shall be paid by the distributor to appellant "as additional rental for the rights herein sold," but they provide immediately thereafter that the distributor shall pay all "forwarding and shipping charges", and make no provision that these latter payments are to go to the appellant (fols. 872-873, 953-954).

In actual practice the shipping department of De Luxe turned over to the carriers the prints that were going abroad without prior storage. But the record shows that, in doing this, it acted on behalf of the distributor, not on behalf of appellant. Although De Luxe was a subsidiary of the appellant, it did work for firms other than appellant and its affiliates (fols. 201-202). The president of De Luxe stated that it never made physical delivery to the premises or an employee of the distributor (fol. 219), but he went on to say that De Luxe acted "merely as

a shipping depot for the International department" (fol. 222). That the term "International department" is a term used by the witnesses to describe the distributors (Twentieth Century-Fox International Corporation and Twentieth Century-Fox Inter-America, Inc.) is clear from other testimony (fols. 347-348, 361-362).

Evidence that the transfer of the completed prints to the De Luxe shipping department constituted delivery to the distributor is found in the procedure followed in connection with such a transfer. De Luxe at that point (when the prints were completed) gave notice to the distributor (not to appellant) that the prints were ready, by furnishing the distributor with copies of the delivery slip (fols. 415-416, 541-543). Only after receiving this information did the distributor issue shipping instructions to De Luxe (fols. 543-544). Thereupon De Luxe packed the shipment and submitted a packing list to the distributor (fols. 544-545). The distributor then prepared invoices covering the prints directed to the foreign customer, which showed the distributor (not appellant) as the seller (fols. 549-551).

Next, the distributor sent a copy of the packing list to a shipping broker, who then booked the shipment on a carrier, and advised De Luxe to deliver the prints to the carrier (fols. 545-548).

It seems clear from this procedure that De Luxe, once the prints were sent to its shipping department, acted on behalf of the distributor, not appellant. Its activities at this point were well described by its president as those of "a shipping depot" for the distributor (fol. 222).

(5)

Appellant relies principally upon *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69 (1946), where the California sales tax was held invalid under the Im-

port-Export Clause as applied to a sale of oil. In that case the taxpayer sold the oil to the New Zealand Government, consigned to the Naval-Officer-in-Charge, Auckland, New Zealand, and delivered the oil "to the order of the Naval Secretary, Navy Office, Wellington, into N.Z. Naval tank steamer R.F.A. Nucula at Los Angeles, California" (*id.*, at p. 71). It was held that the delivery of the oil into the purchaser's ship at Los Angeles "marked the commencement of the movement of the oil abroad" (*id.*, at p. 83).

As we have shown, the appellant in the present case made no comparable delivery. It delivered the prints to the distributor in New York City prior to their movement abroad, and it was the distributor that subsequently had them delivered to the carrier for shipment. The distributor, rather than the appellant, started the prints on their foreign journey.

The present case is controlled by *Empresa Siderurgica* v. *Merced County*, 337 U. S. 154 (1949), since, at the time the tax on appellant accrued (which occurred no later than when it delivered the prints to the distributor), the foreign movement of the prints had not commenced.

POINT II

The Court of Appeals, in examining the referee's reports without disclosing them to appellant, did not deny appellant due process of law.

(1)

The record in this case contains the two determinations of the City Comptroller issued after the hearings held in his office (pp. 520, 666) but does not contain the reports made by the individuals in his office who conducted the hearings. Appellee has taken the position that such reports are not evidence and are not properly part of the record, since, under the terms of the state enabling act

and the local tax law, it is only the appellee's determination which is the subject of review in this proceeding.

The state courts sustained appellee's position with respect to these reports and excluded them from the record (Juris. Statement, p. 30).

Appellant asserts that the Court of Appeals denied it due process of law in that, on the argument of the appeal, the Court received the reports from counsel for the appellee and examined them without disclosing the reports to appellant. Since the hearing referee's reports were merely intradepartmental memoranda, not binding on either the appellant or appellee, the state court properly examined them and excluded them as irrelevant.

(2)

Under the decisions of this Court the procedure followed by the Court of Appeals with respect to the reports was valid. The practice whereby a court inspects documents presented by one side for the purpose of considering their admissibility, without submitting them to the opponent, is well established. As this Court said in sustaining the "Jencks Act," designed to limit defense access to government papers, it would "defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States,* 360 U. S. 343, 354 (1959). See also *Jencks* v. *United States,* 353 U. S. 657, 676 (1957); *Rosenberg* v. *United States,* 360 U. S. 367, 370 (1959); *Gonzales* v. *United States,* 364 U. S. 59, 63-64 (1960).

(3)

Appellant relies on three cases; namely, *Universal Oil Products Co.* v. *Root Refining Co.,* 328 U. S. 575 (1946); *Mazza* v. *Cavicchia,* 15 N. J. 498, 105 A. 2d 545 (1954), and *Application of O'Meally* v. *Rohan,* 286 App. Div. 872, 142 S. 2d 239 (2nd Dept., 1955). Juris. Statement, pages 24-26.

The *Universal Oil Products* case is not at all in point. It simply held that, if rights of parties are to be adjudicated in the course of an investigation directed by the courts, "the usual safeguards of adversary proceedings must be observed" (328 U. S., at p. 580).

In the *Mazza* case the New Jersey Court held that, in an administrative proceeding, due process requires that the report of the person hearing the testimony must be shown to the parties prior to the submission of the report to the deciding officer so that the individual concerned may "supplement, explain, and give different perspective to the hearer's view of the case", and "correct any mistakes that may appear in the report", thus protecting the individual against the possibility "of a miscarriage of justice or the suspicion thereof" (105 A. 2d, at pp. 555, 559).

In the *O'Meally* case, the (New York) Appellate Division, Second Department, citing the *Mazza* decision, held that the administrative agency was required to furnish the hearing officer's report to the individual concerned prior to action by the agency so that the party would have an opportunity to contravert the hearing officer's findings before the agency made its decision.

In the case at bar the appellant has not raised the question involved in the *Mazza* or *O'Meally* case. It is not appealing, as in those cases, from the refusal to give it a copy of the report prior to the administrative determination. It is appealing to this Court solely (in connection with the reports) from a claimed violation of due process resulting from the examination of the reports by the Court of Appeals without disclosing their contents to the appellant or its counsel or requiring that they be inserted in the record.

In fact, the appellant never sought to obtain the first report until after the first administrative determination; nor did it seek to obtain the second report until after the second determination.

Even if it had sought the reports before the administrative determination and its present appeal sought a review of a refusal to furnish it with the reports, the *Mazza* and *O'Meally* cases would, nevertheless, be distinguishable. The appellant does not, as in those cases, seek the reports to contravert or correct them. It seeks the reports to use them to impeach the determination of the administrative officer who under the law is required to make the determination.

The sole reason appellant seeks to obtain the referee's reports is because its counsel believes that they contain recommendations that simple interest should be imposed in this matter rather than statutory penalties and interest (5% penalty for the first month of delay and 1% a month interest thereafter), as assessed by appellee in his determination (fols. 1627-1628, 1681-1682, 1690-1692, 1715-1724. Pet's Br. in App. Div. on review of remand hearing, pp. 9-11; Pet's Br. in Court of Appeals, pp. 43, 45).

Thus, appellant's claim is not that the hearing referees may have erred in their analysis of the evidence and thereby led the appellee into error, but that the referees in their reports correctly analyzed the evidence and the appellee erred in not following their recommendations. Since the issue raised by appellant is not whether the referees' reports correctly reflect the evidence but whether appellee's decision does, the reports are irrelevant here. Assuming that the referees did recommend that the penalties should be remitted to simple interest, that fact has no bearing on the question whether the appellee herein was justified in refusing to exercise his discretion to remit the penalties to interest. That decision must stand or fall on whether the *appellees'* findings and conclusions with respect to the penalties question are sound and are supported by the evidence.

It should be noted that the appellant is not seeking in this Court a review of the decision below sustaining the penalties (Juris. Statement, p. 1).

(4)

Furthermore, this Court has held that such reports of hearing officers need not be disclosed, since they are simply part of the process within the administrative agency that goes into the making of the final decision. *Gonzales* v. *United States,* 364 U. S. 59, 63 (1960); *United States* v. *Morgan,* 313 U. S. 409, 422 (1941). *Cf., National Labor Relations Board* v. *Mackay Radio & T. Co.,* 304 U. S. 333, 350-351 (1938).

The New York Court of Appeals recently disagreed with the holding in the *Mazza* case and stated that, in situations where the hearing officers "do no more than sift and analyze the record" and report to others, due process does not require disclosure of such reports. *Matter of Sorrentino* v. *State Liquor Authority,* 10 N. Y. 2d 143, 147, —— N. E. 2d —— (1961). See to the same effect, *Peoria Braumeister Co.* v. *Yellowley,* 123 F. 2d 637, 639 (7th Circ., 1941) and *Norris & Hirshberg* v. *Securities and Exchange Commission,* 163 F. 2d 689, 693 (Circ., D. C., 1947), cert. den. 333 U. S. 867 (1948).

CONCLUSION

The appeal to this Court from the orders of the Court of Appeals and of the Supreme Court of the State of New York should be dismissed.

September 25, 1961.

Respectfully submitted,

LEO A. LARKIN,
Counsel for Appellee.

STANLEY BUCHSBAUM,
MORRIS L. HEATH,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

In the Matter of the Application of

TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

WILLIAM W. OWENS
Counsel for Appellant
100 Broadway
New York 5, New York

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

POINT 1

THOSE FACTS WHICH ARE EITHER CONCEDED OR UNDISPUTED IN THE MOTION TO DISMISS REVEAL THAT A SUBSTANTIAL QUESTION UNDER THE IMPORT-EXPORT CLAUSE EXISTS.

Appellee, in his motion to dismiss the appeal, takes issue with appellant's interpretation of some of the evidence; but there is enough agreement between the parties to reveal that a substantial constitutional question does exist.

The parties are in agreement that appellant rented its motion picture film to International; that the contract between appellant and International did not authorize the use of the film in the United States; that the film was never used in the United States; that the film was shipped abroad from a point within the City of New York; and that the receipts which have been taxed could not have been realized unless and until the film had been exported.

Such being the case, it is immaterial whether, as appellee contends, the film came into the possession of International before it was exported. Appellee urges an interpretation of the import-export clause under which the touchstone is not whether the receipts necessarily arise out of the export of goods but whether someone other than the owner had the goods in his possession at or before the time the export journey commenced. In none of its decisions has this Court, or even the dissenting justices, suggested so narrow and illogical an interpretation of the constitutional provision. In *Richfield* this Court said that the test was whether "the certainty of the foreign destination is plain" (329 U. S. 83). The certainty could scarcely be plainer than in a case where export necessarily precedes the creation of the receipts,—where the proceeds of foreign exploitation are the measure of the receipts.

The same test—the certainty of the foreign destination—was applied in six of the seven cases on which appellee relies (Motion, pp. 12-17); and the seventh, *Steinbeck*, did not involve either the import-export clause or tangible property. *Turpin* v. *Burgess*, 117 U. S. 504 (1886) and *Cornell* v. *Coyne*, 192 U. S. 418 (1904), involved clause 5 of section 9 of Article I of the Federal Constitution, which prohibits the federal government from levying a tax on exports. As this Court explained in *Richfield* (329 U. S. 79), the Court in those cases upheld federal excise taxes on manu-

factured tobacco and filled cheese because, *at the time the tax attached,* there was no certainty the goods would be exported. In *Spalding & Bros.* v. *Edwards,* 262 U. S. 66 (1923), on the other hand, a federal excise tax was struck down because, as the Court also explains in *Richfield* (329 U. S. 80-81), the tax attached at a time when the goods had commenced their export journey.

Empresa Siderurgica v. *Merced County,* 337 U. S. 154 (1949) and *Joy Oil Co.* v. *State Tax Commission,* 337 U. S. 286 (1949), both decided after *Richfield,* involved the constitutionality, under the import-export clause, of a local property tax on goods destined for export. The test was again whether the goods had started their export journey when the tax attached; and the Court held that they had not. In *Empresa* this Court said (p. 157):

> ". . . it is not enough that *on the tax date* there was a purpose and plan to export this property. . . . It might still have been diverted into the domestic market." (italics supplied).

In *Joy* the Court said (p. 288):

> "The circumstances which tended, *at the time when the tax was assessed,* to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation." (italics supplied).

Appellee, at pages 13 and 16 of his motion, seems to agree that such is the test; but he then disregards the test by urging that he may lawfully collect a tax which could not possibly have attached before export.

Coe v. *Errol,* 116 U. S. 517 (1886), the last of the six cases, involved the commerce clause, not the import-export

clause. Even so, the question was whether timber which the owner had cut in New Hampshire with the intention of shipping into Maine could be subjected to a New Hampshire property tax before shipment. The Court held that it could, because it had not commenced the interstate journey at the time the tax attached. The Court explained that decision too in its *Richfield* opinion (329 U. S. 79).

The instant case does not involve a tax which attached or which could have attached before export. The question is not whether the City of New York could have laid a property tax on the black and white films while they were still at the De Luxe laboratory in the City of New York or whether the Borough of Fort Lee, New Jersey, could have laid a property tax on the color films while they were being superimposed at the Titra laboratory or stored in the warehouse of Bonded Film Storage. Neither is the question whether the City of New York may tax gross receipts which are realized before goods have commenced their export journey. The question here is whether the city may collect a tax measured only by what the goods earned abroad because they were exported. Appellant suspects that the referee in the Bureau of Excise Taxes recognized the distinction and that that is one of the reasons why appellee is concealing the referee's report.

Matter of Steinbeck v. *Gerosa*, 4 NY 2d 302, 151 N. E. 2d 170 (1958), app. dism. 358 U. S. 39 (1958), is the only other authority which appellee cites (Motion, p. 12) in support of his motion to dismiss the appeal in so far as the tax itself is concerned. That case did not involve the export of property. In fact it did not involve the import-export clause at all. The question was whether the City of New York could levy a gross receipts tax on royalties received by a resident author from a publishing house measured in part by the number of books the publishing house sold,—

books which the author had never owned or possessed, in which he never had any interest and which, for the most part, had never been in the City of New York.

The record in *Steinbeck* discloses that such of the books as were sold outside the United States were printed outside the United States and had never been exported. The attorney for the taxpayer conceded as much in his opening statement (see page 32 of the record in *Steinbeck*); and he never suggested in any of his briefs below, in his jurisdictional statement here or in his answer here to the petition to dismiss that the case involved a tax on tangible property or on the receipts therefrom. His principal argument was under the first and fourteenth amendments. He made a subsidiary point in his jurisdictional statement about the commerce clause, not the import-export clause. His argument was that the licenses Steinbeck gave under his copyright must have contemplated that the licensees would ship their books in interstate commerce (see pp. 4-5, 16-17 of the jurisdictional statement in *Steinbeck*) and that therefore the license transaction itself was one in interstate commerce. In his answer to the motion to dismiss, he did not press the contention. He talked about the first and fourteenth amendments only.

The appellee there, who is also the appellee here, stressed at pages 4 and 13 of his motion to dismiss that Steinbeck never had any interest in the books that the publishers printed under his license. Therefore, appellee must be speaking in the vernacular rather than with legal precision when he tells the Court at page 12 of his motion to dismiss this appeal that:

> ". . . the same tax was sustained on Mr. Steinbeck's royalties from the sale of his (sic) books abroad, * * *"

The New York Court of Appeals, in upholding the tax in *Steinbeck*, had already said, quoting from an earlier decision (4 NY 2d 319, 151 N. E. 2d 180):

> "This tax is not on the goods, or on the proceeds of the goods. . . ."

The tax in the instant case *is* on the proceeds of the goods. It is on the rentals which appellant received for the use of its films abroad,—rentals which could not be realized until and unless the films were exported. *Steinbeck* is no more than a reaffirmation of the principle that a resident of the City of New York may be required to pay gross receipts tax on his receipts from business intangibles—in that case royalties from literary compositions written while Steinbeck resided in New York.

Since the parties are not in disagreement on those facts which are basic to the constitutional issue, appellant will not belabor the question whether International, the bailee, got possession of the films before the export journey commenced. That was technically so with respect to those color films which were stored in New Jersey, inasmuch as International paid the warehouseman. It was never so as to black and white. By examining appellee's references to the record, the Court will find that the testimony to which appellee refers either pertained only to color films or pertained to black and white films in 1951 and 1952, several years after the realization of the receipts which have been taxed in this proceeding. Appellant suspects that the referee, who is the only administrative or judicial officer who saw the witnesses and heard them testify, said so in his report.

POINT 2

THE DUE PROCESS QUESTION IS ONE OF FIRST IMPRESSION AND WORTHY OF SERIOUS CONSIDERATION.

It is important to bear in mind that appellant has never asked this or any court below to hold that appellant was deprived of due process of law though the failure of ap-

pellee to give it copies of the referees' reports and an opportunity to rebut them before appellee made his administrative determination. Neither is appellant urging that the failure of the lower courts to require the insertion of the reports in the record was, standing alone, a denial of due process. The due process contention is that the Court of Appeals, and the Appellate Division before it, had no right, over the objection of appellant, to receive those reports and read them in secret before deciding the case. The facts are undisputed:

Appellant protested to the Court of Appeals that the appellate division had received and read the referees' reports before rendering its final decision and without revealing their contents to appellant or its counsel (R. 693-701). Appellant asserted that this was a denial of due process of law (R. 700-701) and it asked the Court of Appeals either to send the case to another appellate division for a determination *de novo* or itself to make a determination *de novo* (R. 701). Appellant made no claim that the reports were evidence (R. 699). Appellant's counsel expressly disavowed in his brief in the Court of Appeals any contention that the referees' reports contained evidence. He said:

> "The lower court has said (f. 2044):
>
> 'The reports sought to be made part of the record by petitioner contained no evidentiary matter and merely represent opinions of subordinates which the Comptroller was not bound to follow.'
>
> "The language seems to imply that petitioner contended below that the reports were evidence. If so, the implication is misleading. Petitioner said in its briefs below that respondent was not bound to follow the recommendations of his referees. It urged, however, that the reports should have been included in the returns to the article 78 orders be-

cause (a) they were part of the record of the administrative proceeding under review and (b) there is no other statement in the record as to why a tax is or is not due. It is the usual thing for a court, when reviewing a decision of a lower court or of an administrative officer or body, to have the benefit of the views of those who were designated to conduct the proceedings below. In the instant case, such reports should be helpful to this Court in evaluating the evidence in the record, for they are the views of the only persons who have seen the witnesses and heard them testify. The *Scalice* report was approved by Referee Scalice's immediate superior without change (ff. 1909-1913); yet petitioner and the Court are not permitted to see the report and there is no contrary opinion in the record, either by the undisclosed functionary who chose to ignore the reports or by the appellate division.

"The opinions of lower courts are not evidence; but they are always included in records on appeal. Certainly the report of someone designated by respondent to conduct the proceedings and make a report, and the unqualified approval thereof by his immediate superior, would be at least as helpful to the appellate tribunal. The more so in the instant case where those who presumably have views contrary to those expressed in the reports have not seen fit to present their views in writing so that their logic may be examined critically."

To forestall a repetition of what had occurred in the Appellate Division, appellant's counsel again disavowed, on oral argument before the Court of Appeals, any contention that the referees' reports were evidence or contained evidence. That is why appellant says that the Court of Appeals' belated statement that the reports were examined to see whether they contained evidentiary matter (R. 685, 703) is a subterfuge.

During the argument by appellee's counsel, the Chief Judge, clearly apprehending some constitutional danger from reading the documents without revealing their contents, asked appellant's counsel to consent to that procedure (R. 708). After consent was refused, the court did it anyhow (R. 708-709).

Appellant does not yet know what is in the reports. But it is sure that they are relevant to the controversy, for they are concededly the reports of the only persons who saw the witnesses and heard them testify. And it naturally arouses suspicion when a court, after unsuccessfully seeking permission to read and conceal a relevant document, does it anyhow. If the referees' reports were not properly part of the record, as appellee urges (Motion, p. 26) and the Court of Appeals seems to think (R. 685-686, 703), the court ought not to have looked at them.

The authorities which appellee cites (Motion, pp. 23, 26) do not touch upon the question which has been raised here; and appellant has found no case where the report of a *referee* (R. 203, 233, 264, 552, 553, 554, 562, 580) has been withheld from an interested party. *Jencks* v. *United States*, 353 U. S. 657 (1957), *Palermo* v. *United States*, 360 U. S. 343 (1959) and *Rosenberg* v. *United States*, 360 U. S. 367 (1959), outlined the extent to which, and the process under which, defense counsel in a criminal case is entitled to see government reports containing possible inconsistent statements of government witnesses. Appellant seeks no statements of witnesses. All it wants are admittedly relevant documents which the lower courts sought and read before rendering their final decisions.

In *United States* v. *Morgan*, 313 U. S. 409 (1941), the court held that, in a proceeding to set maximum rates to be charged by market agencies for their services at the Kansas City stock yards, the Secretary of Agriculture could prop-

erly disregard a memorandum of a subordinate urging certain considerations favorable to the market agencies,—a subordinate who had taken no part in the hearings. No such question is presented here.

In *N. L. R. B.* v. *Mackay Radio etc. Co.,* 304 U. S. 333 (1938), the court held that the full National Labor Relations Board at Washington could hear the case on the record below without requiring the trial examiner to render a report. That was a case where the trial examiner made no report.

In *Peoria Braumeister Co.* v. *Yellowley,* 123 F. 2d 637 (7th Cir. 1941), the court said it was desirable, but not essential, that the licensee, in a proceeding to revoke his liquor license, be served with a copy of the hearing examiner's report before the case was decided by the administrative officer. That was not a case where the court read the report and concealed it. In fact it appears that, by the time of the judicial proceeding, everyone had seen the report.

In *Norris & Hirshberg, Inc.* v. *S. E. C.,* 163 F. 2d 689 (D. C. Cir. 1947), the court said that the commission could utilize the services of subordinates to analyze the evidence received by a trial examiner in a proceeding to revoke defendant's registration as a dealer in securities without revealing to defendant the memoranda which those subordinates prepared. The report of the trial examiner himself was not involved; and the court never saw the memoranda.

Gonzales v. *United States,* 364 U. S. 59 (1960), did not involve the reading by the court and the concealing of a relevant report. Gonzales claimed a military service classification as a minister of religion. When his board eventually classified him 1A, he was given a hearing before an officer in the Department of Justice who made a favorable report; but the Attorney General recommended approval of the 1A classification. The matter then went to an appeal board which furnished Gonzales with a copy of the Attor-

ney General's recommendation but not of the hearing officer's report inasmuch as that report had not been revealed even to the appeal board. On affirmance of the classification by the appeal board and failure to report for induction, Gonzales was convicted for violating the Military Training and Service Act. In this Court, Gonzales claimed unsuccessfully that he should have been given a copy of the hearing officer's report. The Court said (p. 63) the report was not essentially different from a memorandum of an attorney in the Department of Justice and that anyhow the report had never been seen by the appeal board, the body which reviewed the determination of the local board.

Here, unlike *Gonzales,* the report *was* submitted to the body which reviewed the administrative officer's determination—i.e. the court—and was still concealed from the interested party.

In none of the foregoing cases was the report of a referee involved,—only the report of a person whose title signified lesser authority. *Matter of Sorrentino* v. *State Liquor Authority,* 10 NY 2d 143, 176 N. E. 2d 563, the only other authority cited by appellee (Motion, p. 26), was decided by the Court of Appeals in July and not published in the advance sheets until two days after the jurisdictional statement here was served and mailed to Washington. Even *Sorrentino* is substantially different in that there (a) the hearing officer was not a referee, (b) the hearing officer's report was given to the interested party before the court proceeding commenced, (c) the hearing officer's report was inserted in the record and (d), *a fortiori,* the court did not participate in any concealment. The Court of Appeals expressly avoided deciding the due process question (10 NY 2d 147, 176 N. E. 2d 564); but it upheld the ruling of a different Appellate Division that the interested party should have been given a copy of the report before administrative determination by the authority itself.

The court did say (*idem*) that it was difficult to perceive why due process required a report to be made available to the litigant if the hearing officer merely sifted and analyzed the record; but it emphasized that it was not deciding that question. The same court has avoided by silence the more serious constitutional question which appellant has raised,—namely, the validity of the determination below when the Appellate Division read *referees'* reports before final decision and concealed their contents from appellant.

At any rate, *Sorrentino* seems to have destroyed the excuse which the Appellate Division gave for not requiring the referees' reports to be inserted in the record in the instant case (R. 682). The fact that the hearing officer's report contained no evidentiary matter and that the State Liquor Authority was not bound to follow his recommendations did not prevent the Court of Appeals from holding that the report should have been made available to the adverse party before the administrative determination.

As noted in the jurisdictional statement (pp. 8, 24), what the special master did in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 578-579 (1946), most nearly approximates what the lower courts have done in the instant case; and this Court seems to have disapproved of those actions of the special master.

There remains to be cleared up one misconception which has probably arisen because the attorney who handled this case on behalf of appellee in the Appellate Division is dead and those who prepared the motion to dismiss are unfamiliar with what transpired in that court. At page 25 of the motion appellee says that appellant wants the referees' reports because appellant's counsel believes that they would support its claim that simple interest instead of penalties should be assessed on the alleged tax deficiencies.

That is not correct. The first referee, Scalice, held a hearing (six sessions) on both the taxes and the penalties.

He wrote a report. As there is no published manual of procedure in the Bureau of Excise Taxes, appellant learned for the first time that Mr. Scalice had rendered a report when appellee referred to it in his answer in court (R. 21). At the earliest opportunity—page 13 of its brief which was served and filed before the first oral argument in the Appellate Division—appellant called the court's attention to the omission of the report from the record. The propriety of the omission was strenuously argued orally by both sides on the first appearance before the Appellate Division; but the court ignored the point (R. 675-676). Thereafter no opportunity to seek to insert the report in the record was overlooked (R. 542-543, 545, 560-561, 564, 572-576, 682, 693-701). The impropriety of the omission of the report was a separate point in the briefs filed with the Appellate Division after remand and redetermination of penalties, which was before that court made its final order, and it was also a separate point in all briefs in the Court of Appeals.

Appellant never sought the reports for the "sole reason" (Motion, p. 25) that they had to do with the question of interest or penalties. It wanted the Scalice report because it assumed that that report related to both issues in the proceeding. The Saltzman report (R. 554) presumably pertains only to interest or penalties. If the tax falls, the penalties fall too. The only significance of the Saltzman report in so far as this appeal is concerned is that the Court of Appeals deprived appellant of due process of law by reading that report too before rendering its decision.

CONCLUSION

On those facts which are undisputed, a substantial question under the import-export clause exists.

The resort by the Court of Appeals to undisclosed but relevant documents before rendering its decision was a denial of due process of law which requires reversal of the orders appealed from and reargument and redetermination in the court below after insertion of the referees' reports in the record.

October 10, 1961.

Respectfully submitted,

WILLIAM W. OWENS
Attorney for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 373

CAMERON IRON WORKS, INC.,

Petitioner,

v.

LODGE NO. 12, DISTRICT NO. 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS,

Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE ANNEXED PETITION FOR REHEARING AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN LEROY JEFFERS
21st Floor, First City
National Bank Building
Houston 2, Texas

Counsel for Petitioner,
Cameron Iron Works, Inc.

Of Counsel:

VINSON, ELKINS, WEEMS & SEARLS
21st Floor, First City National Bank Bldg.
Houston 2, Texas

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Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the petition for writ of certiorari in this case denied on November 10, 1958. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, this Court has granted certiorari in No. 89, October Term, 1961, *Smith* v. *Evening News Association,* to review the decision of the Supreme Court of Michigan which presents the question of whether the National Labor Relations Board's jurisdiction is exclusive over conduct which is an unfair labor practice under the National Labor Relations Act, As Amended, and, also, a breach of a collective bargaining agreement. *Smith* is a suit for damages for an alleged breach of contract. This petitioner raised this same question in a suit for specific performance of an alleged breached contract nearly four years ago, i.e., the exclusive jurisdiction of the Board over conduct, which,

likewise, is admittedly within its jurisdiction, e.g., discharge by an employer of employees for concerted activity in the course of a strike, but concerning which the Union seeks to compel arbitration pursuant to a collective bargaining agreement in an action for specific performance brought under Section 301 of the Act. Each case is a suit based on an unfair labor practice which is a breach of union contract. The only distinction is that *Smith* seeks money damages while this case seeks specific performance as the remedy for the contract breach.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition *United States* v. *Ohio Power Company*, 353 U.S. 98.

May 9, 1962.

JOHN LEROY JEFFERS
21st Floor, First City
National Bank Building
Houston 2, Texas

Counsel for Petitioner,
Cameron Iron Works, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 373

CAMERON IRON WORKS, INC.,

Petitioner,

v.

LODGE NO. 12, DISTRICT NO. 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of the petition for writ of certiorari denied by its order of November 10, 1958, 358 U.S. 880, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein September 17, 1958.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Present Status of the Case

Petitioner was granted summary judgment in respondent's suit for specific performance of arbitration of strike discharges. The Court of Appeals reversed and remanded the action for trial on the merits, 257 F. 2d 467, and this Court denied certiorari. Adjudication at that point foreclosed petitioner on its further insistent urging of the

exclusive jurisdiction of the National Labor Relations Board over the alleged unfair labor practices of which the specific performance suit sought to compel arbitration.

Subsequent to the denial of the writ in this case, two questions were raised upon a trial of the merits — whether the negotiation history of a "strike settlement memorandum" established that the parties agreed that the grievances would not be subject to the grievance and arbitration procedure of the collective bargaining contract and whether the arbitrator had authority under the collective bargaining agreement to order the payment of back wages. The District Court for the Southern District of Texas held that these parties had not agreed to exclude the grievances from the arbitration procedure and decreed specific performance compelling arbitration of the grievances, but also held that the arbitrator did not have authority to order the payment of back wages. 183 F. Supp. 144. Respondent appealed from that part of the decree concerning back pay and the Court of Appeals for the Fifth Circuit, on June 27, 1961, reversed and held that the arbitrator did have authority to award back pay. 292 F. 2d 112. Petitioner petitioned for a writ of certiorari, No. 433, October Term, 1961, to review this action by the Court of Appeals, which was denied on December 4, 1961. 368 U.S. 926. The grievances involved in this case have not been arbitrated and the Court may issue the writ with the parties in the same status as they were nearly four years ago when the petition was first filed.

Comparison of Smith and Cameron

In *Smith*, No. 89, October Term, 1961, petitioner, as assignee from various union members employed by respondent, brought an action at law in the Circuit Court of Wayne County, Michigan, to recover damages for breach

of contract. The contract provision allegedly breached was a typical "no discrimination" clause found in collective bargaining agreements. It was asserted that respondent breached this provision by permitting certain of its employees to work during a strike, although refusing work to petitioner and his assignors, thereby causing considerable loss of wages to them.

The trial court dismissed for lack of jurisdiction on the ground that petitioner charged respondent with committing an unfair labor practice under the National Labor Relations Act "[which] is an area . . . the federal government has preempted and placed in the exclusive control of the National Labor Relations Board." The Supreme Court of Michigan affirmed on the same ground, 106 N.W. 2d 785, and this Court granted certiorari on the following question:

> "Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act."

In *Cameron* respondent sued for specific performance (based upon an alleged breach of the arbitration provision of the union contract) under Section 301 of the National Labor Relations Act to compel contract arbitration of the discharges by petitioner of fifteen employees, who were advised by petitioner "that they were discharged for alleged misconduct in connection with the strike recently concluded". Petitioner defended principally on the ground that the determination of the issue over the strike discharges was vested exclusively in the National Labor Relations Board. The trial court entered judgment for petitioner on another and secondary ground and did not reach the issue of exclusive jurisdiction of the National

Labor Relations Board. The Court of Appeals in reversing necessarily met that primary issue and held that arbitration may be specifically directed even though the subject matter of a proposed arbitration case is admittedly within the jurisdiction of the Board. 257 F. 2d 467. In its petition for writ of certiorari in this case, this petitioner presented the question this way:

> " . . . has the National Labor Relations Act, as amended, preempted the field of subject matter within the admitted jurisdiction of the National Labor Relations Board, e.g., discharge by an employer of employees for concerted activity in the course of a strike, so as to render the Board's jurisdiction exclusive, thereby depriving a private arbitration board appointed under a collective bargaining agreement of jurisdiction over the same subject matter so as to preclude a District Court from ordering such arbitration under Section 301 of the Labor-Management Relations Act?"

The striking parallel between these two cases is further brought into sharp focus by noting that the same provisions of the National Labor Relations Act, As Amended, are set forth in both petitions as those creating the unfair labor practices which the alleged conduct in each case would violate, i.e., Section 7, 29 USC §157 and Section 8(a)(1) and (3), 29 USC §158. Similarly, both petitioners have pointed to Section 10(a), 29 USC §160, empowering the Board to prevent unfair labor practices, and Section 301(a), 29 USC §185, relating to suits for violations of contracts between employers and labor organizations. The accommodation of these two vital statutory enactments to each other is presented in both *Smith* and *Cameron* as a national issue of real importance.

Smith is an action under Section 301(a) for damages for breach of union contract brought in a state court, which

this Court has only recently decided has jurisdiction of such cases, *Charles Dowd Box Co.* v. *Courtney*, No. 33, October Term, 1961, decided February 19, 1962. It squarely presents the question of whether the language in Section 10(a) that "this power [of the Board to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement, law* or otherwise . . ." preempts the field and deprives the state and federal courts of jurisdiction to entertain a breach of contract damage suit under Section 301(a), where the conduct constitutes both an unfair labor practice and a breach of contract. This, of course, is the "*law*" part of the exclusionary language in Section 10(a).

Cameron presents the "*by agreement*" aspects of the same exclusionary language, i.e., Does Section 10(a) vest exclusive jurisdiction in the Board to deal with conduct which constitutes an unfair labor practice or may the parties "*by agreement*", enforced in an action under Section 301, defeat the exclusive jurisdiction of the Board by adjudicating that same conduct before an arbitrator allowed to fashion such remedies as he sees fit?

The Court has agreed to determine whether the damage suit based on an unfair labor practice in *Smith* can be maintained and the exclusive jurisdiction of the Board thereby denied, and it should also determine the companion problem presented by this case of whether the Board can be ousted of exclusive jurisdiction by court compelled arbitration of the alleged unfair labor practice.

Petitioner in *Smith* supports this very conclusion for, after quoting from the Court of Appeals' opinion in our case and citing numerous other decisions with similar holdings (p. 9 of Smith's petition), he points out:

"It is true that in most of these cases the action to enforce the contract took the form of an action to compel arbitration, though three involved damages for breach of contract, i.e., United Steelworkers, Local 4264 v. New Park Mining Co., (10th Cir., jurisdiction upheld); Textile Workers v. Arista Mills Co., (4th Cir., jurisdiction upheld); and Local 774, IAM v. Cessna Aircraft Co., (Kan. Sup. Ct., jurisdiction denied). Also, Judge Magruder has suggested that '[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the preemption doctrine is possible.' United Electrical Workers, Local 259 v. Worthington Corp., 236 F. 2d 364, 367, 38 LRRM 2507, 2510 (1st Cir. 1956). And see Note, 'Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice,' 69 Harv. L. Rev. 725, 736-737 (1956). *However, the courts which have passed upon the point have usually not drawn any such distinction, but have simply asserted that, when the same conduct may constitute both a breach of a collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of proceeding in court on the contract.* See, e.g., United Steelworkers, Local 4264 v. New Park Mining Co., 273 F. 2d 355, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959). The Courts below in the present case did not suggest that a different result would have been reached had this proceeding been an action to compel arbitration instead of a suit for damages, though respondent argued that the two types of cases should be distinguished. In any event the matter is an important one which should be resolved by this Court." (Emphasis added.)

Exclusive Jurisdiction of the NLRB v. Court Compelled Arbitration Still Unresolved

There has been no change in the status of the law since the Court of Appeals in our case declared that the issue of

whether a federal district court may enforce arbitration under Section 301 of the Act of an alleged unfair labor practice within the jurisdiction of the National Labor Relations Board under Sections 7, 8 and 10(a) of the Act had not been previously decided by the Supreme Court. The Court said:

> "This question has not been previously raised in this Court, *nor has it been decided by the Supreme Court.*" (257 F. 2d at 472, emphasis added.)

There has been no clarification by the Supreme Court since the Court of Appeals for the First Circuit in *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1956), made the same declaration:

> "However, there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice." (236 F. 2d at 367)

Further, the same conflict between the decision of the Court of Appeals in our case and the decisions of other Courts of Appeals is still unresolved, and remains as the Court of Appeals in our case recognized it in footnote 14 to its opinion, when it stated:

> "The following cases held that the jurisdiction of the Board in the field of unfair labor practice would preempt state agencies *or private arbitrators* from acting: NLRB *v.* International Union, 7th Cir. 1952, 194 F. 2d 698; NLRB v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789." (257 F. 2d at 472)

In fact the conflict has become more pronounced through the Court of Appeals' decision in *Operating Engineers*,

Local 715 v. *Gulf Oil Corporation*, 262 F. 2d 80 (1958), cert. denied, 359 U.S. 992, and the decision of the Court of Appeals for the Tenth Circuit in *United Steelworkers of America* v. *New Park Mining Co.*, 273 F. 2d 352 (1959), both holding under similar fact situations that there was not exclusive jurisdiction in the Board, while the Court of Appeals for the Ninth Circuit in *Portland Web Pressmen's Union* v. *Oregonian Pub. Co.*, 286 F. 2d 4 (1960), affirmed a trial court judgment dismissing a complaint brought under Section 301 to compel arbitration with the statement:

> "We likewise agree with the district court that any rights which appellant Pressmen might claim would arise under the National Labor Relations Act and that exclusive jurisdiction would be with the National Labor Relations Board." (286 F. 2d at 8)

A petition for writ of certiorari was denied in the latter case, 366 U.S. 912, but the order notes that Justices Black and Douglas were of the opinion that certiorari should be granted seemingly on the very point raised here and upon the companion point to that on which certiorari was granted in the *Smith* case.

Potential Conflict if Exclusive Jurisdiction in the NLRB is not Found

A few cases since the Court of Appeals decision in this case suffice to highlight the potential and actual conflicts inherent in a holding that arbitration may be compelled of grievances involving conduct which also constitutes an unfair labor practice. At least three courts have held that arbitration was not precluded and, in fact, compelled arbitration even though the jurisdiction of the Board had been invoked by filing unfair labor practice charges based upon the same conduct:

(1) *Glass Bottle Blowers Association* v. *Arkansas Glas Container Corp.*, 183 F. Supp. 829 (D.C. Ark. 1960), wher the union filed an unfair labor practice charge with th National Labor Relations Board during the processing o the grievance, and the Board dismissed the charge findin insufficient evidence of a violation of the law.

(2) *Retail Shoe & Textile Sales. U.* v. *Sears Roebuck Co.*, 185 F. Supp. 558 (D.C. Calif. 1960), where the compan refused to arbitrate and the union filed both an action t compel arbitration under Section 301 and an unfair labo practice charge with the Board, which had not yet bee acted upon by the Board at the time the Court rendered it decision.

(3) *In re Dalero Corp.*, 213 N.Y.S. 2d 661, (N.Y. Sup Ct. 1961), where the court denied the company's applicatio to stay arbitration, although unfair labor practice charge had been filed, on the ground that the Board had refused t issue a complaint for the reason that the alleged violation occurred more than six months prior to the filing of th charge.

The ultimate in potential conflict and confusion is readil apparent in the following statement by the Appellate D vision, New York Supreme Court, in *Carey* v. *Westinghous Electric Corporation*, 221 N.Y.S. 2d 303 (1961):

> "We start with the proposition that a breach of co tract does not become ipso facto incapable of arbitra tion because it also happens to be an unfair labo practice (Lodge No. 12, v. Cameron Iron Works, 2 F. 2d 467, U.S.C.A. 5th Circuit). In other words, th field is not pre-empted. On the other hand, where th NLRB has assumed jurisdiction the orderly proces of justice demands that the matter should not be sub mitted to another forum, even though a breach of co tract may be involved (Matter of Amperex Electron

Corporation [Rugen], 284 App. Div. 808, 132 N.Y.S. 2d 93). *The dividing line between these extremes would seem to be best fixed at that point where the peculiar expertise of the NLRB has found expression.* Undoubtedly one of the fields in which it has so found expression is that of representation. The claims of conflicting unions representing different classifications of employees within one company may be said to be its special province. And there are, of course, other fields. When it is sought to invade one of those fields it is immaterial whether the interference is contemporaneous with the Board's decision (as in Matter of Amperex Electronic Corporation, supra) or seeks to avoid it by a subsequent application to arbitrate (Matter of Apex Lumber (Teamsters Local), 15 Mis. 2d 15, 179 N.Y.S. 2d 503) or seeks to anticipate it, as here. That is not to say that where the question of contract breach is direct and the question of representation is peripheral, arbitration may not be had. It may. (Freight Drivers v. Quinn Freight Lines, Inc., 195 F. Supp. 180, U.S.D.C., Mass.)". (221 N.Y.S. 2d at 308, emphasis added)

CONCLUSION

This Court has not expressly decided the important questions under the National Labor Relations Act, As Amended, of whether the jurisdiction of the National Labor Relations Board provided for in Section 10(a) of the Act is exclusive over subject matter within the admitted jurisdiction of the Board and deprives the state and federal courts of jurisdiction over the same subject matter in (1) a damage suit action under Section 301 for breach of contract, and of (2) an action for specific performance to compel arbitration of an alleged unfair labor practice under Section 301. The Court has agreed to determine the damage suit question and it should decide the arbitration question at the same time.

At the time of the trial on the merits and at the ti
of the second petition for writ of certiorari to this Cou
petitioner was foreclosed on further pleading the exclusi
jurisdiction of the National Labor Relations Board. T
granting of the writ in the *Smith* case should now op
that door. These discharges for concerted strike acti
have still not been arbitrated. They are still alleged unfa
labor practices within the exclusive jurisdiction of t
National Labor Relations Board. If necessary, this petiti
for rehearing should be considered as filed in and shou
be granted on both of the two prior petitions for writ
certiorari to the end that the issue of the exclusive juri
diction of the National Labor Relations Board, which p
titioner vainly sought to have previously adjudicated, ma
be passed upon at the same time that the like issue
adjudicated in the *Smith* case. This is implored that p
titioner may have its day in court on this issue and to t
end that justice may be done.

For the reasons set forth above, and in the petitions fo
writ of certiorari, it is respectfully urged that rehearing
granted and that, upon such rehearing, a writ of certiora
issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

John Leroy Jeffers
21st Floor, First City
National Bank Building
Houston 2, Texas

Counsel for Petitioner,
Cameron Iron Works, Inc.

Vinson, Elkins, Weems & Searls
21st Floor, First City National Bank Bldg.
Houston 2, Texas

Of Counsel for Petitioner,
Cameron Iron Works, Inc.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

JOHN LEROY JEFFERS

Counsel for Petitioner,
Cameron Iron Works, Inc.